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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

ALBERT G. BROWNE, JR.,
REPORTER.

VOLUME III.

BEING

MASSACHUSETTS REPORTS,
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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
(Appointed February 7, 1868.)

HON. EBENEZER R. HOAR.

HON. REUBEN A. CHAPMAN.

HON. HORACE GRAY, JR.

HON. DWIGHT FOSTER.

HON. JOHN WELLS.

HON. JAMES D. COLT.
(Appointed February 14, 1868.)

ATTORNEY GENERAL,
HON. CHARLES ALLEN.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

JANUARY TERM 1868, AT BOSTON.

[CONTINUED FROM VOL. XCVIII.]

PRESENT:

HON. EBENEZER R. HOAR,
HON. REUBEN A. CHAPMAN,
HON. HORACE GRAY, JR.,
HON. DWIGHT FOSTER,
HON. JOHN WELLS,
} JUSTICES.

MIDDLESEX COUNTY.

JOHN WALAN *vs.* EDWARD KERBY.

Under the Gen. Sts. *c.* 86, § 61, a purchaser of intoxicating liquors sold in violation of law, who, in settling mutual accounts with the seller, has credited him with the price thereof, may recover the amount of such credit as a balance due on the account upon which he allowed it.

If a purchaser of intoxicating liquors sold in violation of law, in settling mutual accounts with the seller, credits him with the price thereof, and, receiving from him payment of the balance found due after such an allowance, gives him a receipt in full settlement of the accounts, such payment and receipt do not have the effect of an accord and satisfaction to bar an action to recover the amount so credited.

CONTRACT on an account annexed for "money and board and other compensations received by the defendant of the plaintiff for spirituous and intoxicating liquors illegally sold by the defendant to the plaintiff;" with a count for money had and received; and a special count alleging that the defendant had received of the plaintiff the sum sued for "in payments and

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other compensations for spirituous and intoxicating liquors sold by the defendant to the plaintiff in violation of law, and which said money and other compensations were received without consideration, and against law, equity and good conscience, whereby there hath accrued to the plaintiff the right to have and recover of the defendant the said money and the value of said other compensations." Answer, accord and satisfaction.

At the trial in the superior court, before *Brigham*, J., without a jury, on appeal from a trial justice, the material facts were found as follows: On July 10, 1865, the parties accounted together. The plaintiff exhibited against the defendant a bill of $44 for board. The defendant exhibited against the plaintiff bills for rent, wood and money lent, amounting to $19; and bills for intoxicating liquors sold by him to the plaintiff in violation of law, amounting to $17.30. The balance was struck, which the defendant paid and the plaintiff accepted in settlement, both bills of intoxicating liquors being included in the reckoning and allowed by the plaintiff, who gave to the defendant the following receipt: "Hopkinton, July 10, 1865. Received of Edward Kerby in full up to date. John Walan."

On these facts the judge ruled that the plaintiff was entitled to recover; and the defendant alleged exceptions.

H. L. Parker, for the defendant.

L. H. Wakefield, for the plaintiff.

Foster, J. "All payments or compensations for spirituous or intoxicating liquors sold in violation of law, whether in money, labor or personal property, shall be held to have been received without consideration, and against law, equity and good conscience." Gen. Sts. *c.* 86, § 61. This explicit and stringent provision of the statute admits of no other construction than that such payments may be recovered back in an action for money had and received. The seller and buyer of intoxicating liquors sold in violation of law are not *in pari delicto*, because the latter is guilty of no offence. *Commonwealth* v. *Willard*, 22 Pick. 476. *Commonwealth* v. *Downing*, 4 Gray, 29. When the purchaser seeks to recover back the price he has paid, the illegality of the transaction, of which he offers evi-

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dence, is wholly on the part of the defendant, and he himself is not *particeps criminis*. The manifest intent of the section above cited, according to the only construction of which it is fairly susceptible, was to confer such a right of action. From motives of public policy, the legislature has deemed it expedient, notwithstanding a degree of delinquency in both parties, to inflict criminal punishment upon the seller only, and also to allow the purchaser to recover back the price he has paid under the illegal contract.

The allowance of the illegal items by way of set-off can have no greater effect than would have been given to their actual payment in cash. In the present case, there was no adjustment of unliquidated claims or compromise of disputed demands on either side. Nothing was done except to ascertain and pay the difference between a larger and smaller account. We cannot treat this payment as an accord and satisfaction sufficient to preclude future inquiry into the illegality of a part of the items. *Donohue* v. *Woodbury*, 6 Cush. 148. *Alvord* v. *Marsh*, 12 Allen, 603. *Tuttle* v. *Tuttle*, 12 Met. 551. They were necessarily as well as actually embraced in the settlement. If a balance had been struck without them, there would have been no consideration to support even an express promise to accept the smaller sum paid in full discharge of the larger sum actually due. Such an agreement being without consideration as to the excess, notwithstanding a receipt in full, the difference could still be recovered. *Brooks* v. *White*, 2 Met. 285. *Twichell* v. *Shaw*, 10 Cush. 48.

We do not need to consider the question whether proof of the allowance of illegal items in the settlement of a mutual account would support an action for money had and received. The declaration upon an account annexed may be used whenever one or more items are claimed which would be correctly described by either of the common counts. Gen. Sts. *c.* 129, § 2, *cl.* 7. The account in this case is for board, as well as money, and the board still remains due unless it has been paid by crediting the purchases of intoxicating liquor.

Exceptions overruled.

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ISABELLA MCLAUGHLIN *vs.* JOHN COSGROVE.

The foreclosure of a mortgage of land has the effect of a payment of the debt and makes absolute the title of the mortgagee, although the consideration of promissory notes which the mortgage was made to secure was the price of intoxicating liquors sold in violation of law.

WRIT OF ENTRY by the heir of a mortgagor of land against the mortgagee in possession after foreclosure. In the superior court, on agreed facts which are stated in the opinion, *Reed*, J., directed a verdict for the tenant, and reported the case.

J. C. Kimball, for the demandant.

T. H. Sweetser, (*G. Stevens* with him,) for the tenant.

CHAPMAN, J. The demandant admits that her ancestor, Daniel McLaughlin, gave the tenant two mortgages of the demanded premises; one dated April 25, 1855, and the other dated February 12, 1858; that the tenant entered for foreclosure on the 6th of March 1863; and that the foreclosure was completed prior to the commencement of this action. But it appears that these mortgages were made to secure the payment of notes which were given in payment for intoxicating liquors illegally sold by the tenant to the mortgagor. By the statute then existing, these notes were void; and it is admitted that, if the mortgage had not been foreclosed, this action could not be maintained. For, as a security for a debt made illegal by statute, the mortgage could not be enforced against the demandant, who is the heir of the mortgagor. It is necessary, then, to consider the effect of the foreclosure.

A deed of mortgage conveys to the mortgagee the legal title to the land, subject to a condition. If the condition be performed according to its terms, the title of the mortgagee is thereby defeated. If not performed at the day, the legal estate remains in the mortgagee, and an equitable right to redeem by payment at a later day is all that remains in the mortgagor, unless he can show that the consideration was illegal, in which case he may defeat the mortgage altogether. But if the grantee enters for breach of the condition, and keeps possession till the

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right to redeem is foreclosed, he then has an absolute title; and the value of the land is applied, by operation of law, to the payment of the debt secured by the mortgage.

In a case like the present, it is as if the mortgagor had purchased the liquors, and paid for them by an absolute conveyance of the land. If, then, the demandant can recover, it must be on the ground that the property given in payment for liquors illegally sold can be recovered back. But such is not the law. Payments made for intoxicating liquors in money, labor or personal property, may be recovered back. Gen. Sts. *c.* 86, § 61. *Walan* v. *Kerby*, *ante*, 1. But the statute does not extend to payments made in real estate. The demandant has lost her claim to the land by not bringing her action till after the mortgage was foreclosed.

Judgment for the tenant on the verdict.

LYMAN K. PUTNEY & another *vs.* MITCHELL D. HARDY.

Evidence that, at the time of the sale of an express which was run over the line of a railroad, the seller, having notice from the railroad corporation that on a certain day it would take back the privileges which it had allowed to expressmen over the road, in order to make such arrangements for the future as might be desirable, did not mention this to the purchaser, and represented to him that he could continue to run the express over the road, and would have no difficulty in making arrangements with the corporation for the purpose; but that the purchaser knew that the seller had no arrangement with the corporation which would prevent it from withdrawing at any time the privilege of running the express over the road; is not sufficient to sustain an action by the purchaser against the seller for false and fraudulent representations.

TORT for making false and fraudulent representations as an inducement to the plaintiffs to buy the implements, rights and good will of the defendant's business as an expressman between Boston and Framingham.

Trial in the superior court, before *Reed*, J., when it appeared that the sale was made June 2, 1865. The other evidence is stated in the opinion. The judge made certain rulings which are there stated; directed a verdict for the defendant on the

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ground that the evidence did not show that his representations were false; and reported the case for revision by this court.

A. R. Brown, for the plaintiffs.

T. H. Sweetser, for the defendant.

Hoar, J. We are unable to find any just ground of exception to the rulings made at the trial of this case. The cause of action set forth in the plaintiffs' declaration is, that the defendant induced them to buy his horses, wagons, and other property described, and his interest in the express business between Boston and Framingham, by means of certain false and fraudulent representations. The court ruled, and the correctness of the ruling is not questioned by the plaintiffs' counsel, that to maintain the action it must be shown, first, that the defendant made the representations alleged; and secondly, that they were false. The false representations charged were these: that the plaintiffs could continue to run the express, and transact express business upon and over the Boston and Worcester Railroad, and would have no difficulty in making all needful arrangements with the railroad corporation for that purpose. It appeared that the defendant had no contract with the railroad corporation for the continuance of the express business for any specified time, but that the corporation at any time might deprive him of the privilege of running an express on their road; and that these facts were known to the plaintiffs at the time of the sale.

The only evidence offered of the falsity of the representations was, that the defendant had received a notice from the superintendent of the railroad, which he concealed from the plaintiffs, to this effect, "that, commencing July 1, 1865, the corporation will take back into its own hands the express privileges between Boston and Saxonville, in order to make such arrangements for the future as may be found desirable." Saxonville is the village of Framingham to which the defendant's express had run.

We can see in this notice no evidence that the railroad corporation would not have been willing to make all needful arrangements with the plaintiffs for their continuing the express business, if they had been applied to for that purpose. It certainly states nothing of the kind. It appears that the plaintiffs did not

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apply, and were led to take that course by the defendant's advice, and that the right to run an express was given to other parties. But the cause of action stated in the declaration is not the giving of bad advice, whether corruptly or unwisely; or the fraudulent concealment of the receipt of the notice. There was no evidence whether the new arrangements which the railroad corporation proposed to make would not have been as "desirable" to the plaintiffs as to themselves, if the parties had conferred together. It is not shown that, when the notice was given, it was in contemplation to make arrangements with any one else than the defendant or his successors by assignment.

For the reason, therefore, that the evidence had no tendency to prove that the representations charged in the declaration were false, the direction that a verdict should be returned for the defendant was rightly given to the jury.

Judgment on the verdict.

CHARLES A. F. SWAN *vs.* ALEXANDER STEPHENS.

A sheriff's sale on execution of the judgment debtor's right in equity to redeem mortgaged real estate, which the debtor claims to be exempt from levy as a homestead, is not invalid, under the Gen. Sts. c. 104, § 11, because not made expressly subject to the homestead estate.

On trial of a writ of entry for possession of property of which the demandant is general owner subject to a homestead estate of the tenant which has not been set off to him, the burden is on the tenant to prove that the value of the property is such that his homestead right covers the whole of it.

Under plea of *nul disseisin* to a writ of entry, the tenant is estopped from denying that he holds the freehold against the demandant.

In a mortgage of real estate, the only effect of a release by the mortgagor and his wife of all right of homestead in the mortgaged premises is, to subject the homestead, together with the residue of the estate, to payment of the mortgage debt.

Under plea of *nul disseisin*, without further specification, the tenant may set up a right of homestead in defence against a writ of entry.

WRIT OF ENTRY, dated January 22, 1867, for possession of a dwelling-house and land in Lowell. Plea, *nul disseisin*. Subject to the demandant's objection that, under this plea, the ten-

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ant could assert no right of homestead in the demanded premises, the facts were agreed in the superior court as follows:

On September 2, 1854, the tenant received a conveyance of part of the land with the dwelling-house; and on July 4, 1857, one of the rest of the land, which lay contiguous to the former lot. Each parcel of land contained forty-one hundred and forty-six square feet. From the time of the conveyance of the first lot to him, the tenant occupied it with his family, as a householder; and so also from the time he acquired the second lot he occupied it in connection with the first. But his intention to hold the premises as a homestead was not set forth in either of the deeds, nor ever declared by any writing.

On September 26, 1858, the tenant made a mortgage of the premises to secure a debt of three hundred dollars; and his wife joined in the deed to release all right of homestead. This mortgage was outstanding at the date of this writ.

On October 11, 1866, John G. Kaulbach obtained judgment against the tenant on a debt contracted after May 30, 1857, the date of the enactment of the homestead act of that year, St. 1857, *c.* 298; and levied execution on the tenant's right in equity to redeem the mortgaged premises; and the demandant purchased such right at the sheriff's sale, and claimed title under his deed from the sheriff. Neither in the sheriff's deed, nor in his return on the execution, nor at the sale, was any reference made to any right of homestead of the tenant; but before the sale the tenant gave notice to the sheriff that he held the premises under the homestead act, and so that the sheriff had no right to sell them. The tenant was present at the sale, and made one bid, of five dollars.

On these facts judgment was ordered for the tenant, and the demandant appealed.

W. P. Webster, for the demandant.

N. St. J. Green & C. Cowley, for the tenant.

Wells, J. Upon the statement of facts it is clear that the tenant acquired an estate of homestead in the dwelling-house and lot of land purchased in 1854; and that he had no such right in the second parcel, purchased in 1857. The demandant

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is therefore entitled to have judgment for full possession of the second parcel; and also for the other parcel subject to the rights of homestead in the tenant and his family; unless this result is required to be modified by some of the considerations urged by the respective parties. St. 1855, *c.* 238. St. 1857, *c.* 298.

1. The tenant denies the validity of the sheriff's sale, because not made expressly subject to the estate of homestead. Gen. Sts. *c.* 104, § 11. But as the sale would necessarily be subject to the homestead right, whether so declared or not, we are of opinion that the omission to make it so, expressly, does not operate to invalidate the sale altogether. It could in no way prejudice the rights of the debtor, nor could it affect his means of enforcing or enjoying his estate of homestead.

2. The tenant contends that, as it is not shown that the premises subject to the right of homestead exceed eight hundred dollars in value, the demandant does not appear to have any present right of possession therein, and cannot have any judgment for the same. But the demandant is the general owner, entitled to possession of the whole, except so far as the tenant's special title may exclude him. Until the homestead has been set out to the debtor, he and the owner of the residue are in the relation to each other of tenants in common. *Silloway* v. *Brown*, 12 Allen, 30. If the tenant seeks to establish an exclusive right to any part of the premises as a homestead, it is for him to show that that limited right is sufficient to cover the entire parcel so claimed. *Wolcot* v. *Knight*, 6 Mass. 418. Jackson on Real Actions, 160, 161.

3. The tenant also contends that, as to the parcel subject to the homestead right, the action cannot be maintained without evidence of an actual disseisin. But he has pleaded the general issue only; and, under that plea, is estopped to deny that he was in possession of the whole premises and claiming a freehold therein. Gen. Sts. *c.* 134, § 5. *Higbee* v. *Rice*, 5 Mass. 344, 351. *Washington Bank* v. *Brown*, 2 Met. 293. *Devens* v. *Bower*, 6 Gray, 126.

4. The demandant contends that the tenant has parted with his homestead right by the mortgage, in which his wife joined

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to release all right of homestead. But the demandant has not acquired it; and the effect of such a release can be nothing more than to subject the homestead, as well as the residue of the estate, to the payment of the mortgage debt.

5. The demandant also contends that the tenant cannot avail himself of his homestead right, in this suit, because he has failed to specify the same under his plea of *nul disseisin*. In the case of *Castle* v. *Palmer*, 6 Allen, 401, 405, the court suggest a question whether such a specification should not be made. The reason assigned for requiring it is, "in order to have the proper judgment entered." But the judgment is always entered according to the findings upon the issue tried. "The demandant may recover any specific part of the premises, or any undivided portion thereof to which he proves a sufficient title, though such part or portion is less than is demanded in the writ." Gen. Sts. *c.* 134, § 10. *Nul disseisin* puts the whole title in issue. This issue may be maintained by the tenant on his part, either negatively, by disproof of the title set up by the demandant, or affirmatively, by proof of title in himself. One mode is just as strictly within the issue as the other. If, upon the proofs, it appear that the tenant has a freehold in any part of the premises, either exclusive, or in common and undivided, the recovery by the demandant must be limited accordingly. If the tenant seek to defeat the suit, by justifying his acts of possession under some right less than the entire freehold, he must specify the right or title upon which he relies, and disclaim as to the residue. *Dunbar* v. *Mitchell*, 12 Mass. 373. *Russell* v. *Lewis*, 2 Pick. 508. *Wheelwright* v. *Freeman*, 12 Met. 154. *Johnson* v. *Rayner*, 6 Gray, 107.

A homestead right is such a freehold estate as will avail the tenant in defence to a writ of entry. *Silloway* v. *Brown*, 12 Allen, 30. If it extend over the entire premises sued for, and require the whole value of the estate to satisfy it, then the action will be defeated. *Parks* v. *Reilly*, 5 Allen, 77. But if it fall short of this, either in value or extent, and there is no disclaimer as to the residue, the demandant is entitled to recover; but his judgment must necessarily be a limited one, in accordance with

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the statute above quoted. We are of opinion that no specification, in addition to the general issue, is necessary, to entitle the tenant to set up his homestead right in defence, or to enable the court to enter the proper judgment.

Judgment for the demandant, subject to the homestead right of the tenant in the dwelling-house and the parcel of land purchased in 1854.

CHARLOTTE S. HILBOURN *vs.* CHARLES FOGG & others.

A tenant claiming under an oral lease from a tenant at will is not estopped from maintaining an action of tort in the nature of trespass *quare clausum fregit* for his eviction from the tenement by one claiming under a subsequent written lease from such tenant at will.

TORT in the nature of trespass *quare clausum fregit* against Charles Fogg, Martha McGrath, and two others.

At the trial in the superior court, before *Reed*, J., the plaintiff offered evidence tending to show that McGrath was tenant at will of a dwelling-house in Charlestown, and the plaintiff was in occupation of a room therein, as a tenant at will under McGrath, for a rent payable weekly, and had paid the rent to January 10, 1866; that, on January 11, McGrath made a written lease of the room to Fogg for six months; and that, after giving the plaintiff, on that day, written notice of this lease, and to quit the room in three days, Fogg, with the assistance of McGrath and the other defendants, entered the room on January 20, in the plaintiff's absence, and removed her effects and set them out of doors.

The judge ruled that the action could not be maintained on these facts; directed a verdict for the defendants; and reported the case for revision by this court.

J. F. Pickering, (*C. D. Dunton* with him,) for the plaintiff.

C. Robinson, Jr., for the defendants.

GRAY, J. The well settled rule of law, by which a tenant who has entered into possession under an oral lease is estopped, so long as he continues in possession under the lease, to deny

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the lessor's title at the time of making the lease, as against the lessor, his heirs and assigns, is founded on the injustice of allowing a person, who has obtained possession by admitting the title of another, to deny that title and, in case of failure in proof of it, hold the premises himself. The rule holds good where the actual title of the lessor is that of a mere tenant at will, and applies in every form of action by which the lessor may seek to assert the rights reserved or promised to him in his lease. *Coburn* v. *Palmer*, 8 Cush. 124. *Towne* v. *Butterfield*, 97 Mass. 105.

But it is equally well settled that the tenant is not estopped to deny that since his own entry into possession his lessor's title has expired, either by its own limitation, by the act of the lessor, or by eviction by title paramount; and that, when the estoppel is set up by one claiming as assignee of the lessor, the tenant may show that such assignment was ineffectual to pass the lessor's title. *England* v. *Slade*, 4 T. R. 682. *Doe* v. *Edwards*, 5 B. & Ad. 1065. *Doe* v. *Barton*, 11 Ad. & El. 307, and 3 P. & Dav. 194. *Mountnoy* v. *Collier*, 1 El. & Bl. 630. *London & Northwestern Railway Co.* v. *West*, Law Rep. 2 C. P. 555. *Despard* v. *Walbridge*, 15 N. Y. 377, 378. In *Doe* v. *Barton*, Lord Denman said that if the lessor had been strictly tenant at will of another, no doubt his tenant might have shown the determination of that will on the part of the lessor's lessor.

In this case, the plaintiff occupied her room as tenant at will of McGrath, and, while this tenancy at will continued, might maintain an action against McGrath, or any person claiming under her, for disturbing the plaintiff's possession. *Dickinson* v. *Goodspeed*, 8 Cush. 119. McGrath made a written lease of the room to Fogg, which, if the lessor had had a sufficient title, would have terminated the tenancy at will of the plaintiff, and prevented her from maintaining this action for the removal of her goods. *Curtis* v. *Galvin*, 1 Allen, 215. *Pratt* v. *Farrar*, 10 Allen, 519. But the report finds that McGrath did not own the estate, and was herself a mere tenant at will of the rightful owner; and could not therefore make a valid alienation by written lease which would give Fogg a better title than she had previously granted to the plaintiff. *Cooper* v *Adams*, 6 Cush.

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90, 91. This fact is in no way inconsistent with her title as lessor at will of the plaintiff; and the plaintiff, by having entered into possession as her tenant at will, was not estopped to deny that she had any greater estate, and to maintain this action.

New trial ordered.

SARAH S. MILLER *vs.* CHARLES H. LANG.

A tenant in possession cannot hold over after the expiration of his term, under a claim of title to the premises in his wife, although he has cohabited with her there during the term.

ACTION on the Gen. Sts. *c.* 137, for possession of a house and land in Reading. Trial in the superior court, before *Brigham*, J., without a jury, when it appeared that the defendant took from the plaintiff a written lease of the premises for a year from April 30, 1865, and occupied them during the term, cohabiting with his wife, but at the end of the term refused to deliver them to the plaintiff.

The defendant offered to prove that on February 11, 1857, the premises were conveyed by a third person to the defendant's wife, to her sole and separate use; that from that time to the beginning of this action she there cohabited with the defendant; and that prior to the end of the term of the lease the defendant gave the plaintiff notice that he should renounce the plaintiff's title and claim thenceforth under the title of the defendant's wife.

But the judge excluded this evidence as incompetent, and found for the plaintiff; and the defendant alleged exceptions.

A. A. Prescott, for the defendant.

I. D. Van Duzee, for the plaintiff.

GRAY, J. A tenant in possession, even after his lease has expired, cannot deny his landlord's title, without either surrendering possession to him, or attorning, or at least giving notice to his landlord that he shall claim under another and a valid title. *Hilbourn* v. *Fogg*, *ante*, 11. *Morse* v. *Goddard*, 13 Met. 177.

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Boston v. *Binney*, 11 Pick. 8. *Zeller's lessee* v. *Eckert*, 4 How. 295. The only title which the defendant proposed to claim under was that of his wife, from whom he could derive no title by contract or grant. *Thomson* v. *O'Sullivan*, 6 Allen, 303. *Gay* v. *Kingsley*, 11 Allen, 345. The defendant therefore showed no title in himself, and no defence to this action. Judgment against him will not affect his wife's title.

Exceptions overruled.

THOMAS J. CLARK *vs.* SAMUEL A. WHEELOCK.

If a tenant at will underlets and surrenders possession to his undertenant, notice to the latter of a subsequent written lease for years from the owner, and to quit forthwith, is sufficient to sustain an action brought against him twelve days afterwards by the lessee for years for possession of the premises.

ACTION on the Gen. Sts. *c.* 137, for possession of a dwelling-house and land in Cambridgeport. Writ dated May 24, 1866. At the trial in the superior court, before *Vose*, J., without a jury, on appeal from the police court of Cambridge, the judge found these facts:

The plaintiff claimed under a written lease of the premises to him from John Leishman, their owner, dated May 1, 1866, for one year from that date. For the four years preceding, Francis B. Kern had hired the premises from Leishman by an oral agreement; had paid rent to May 1, 1866; and at some time during the four years had underlet the premises, by an oral agreement, to the defendant, who on May 1 was in occupation of them. After that date neither Kern nor the defendant paid to the plaintiff any rent. On May 12 the plaintiff served on the defendant a written notice of his lease from Leishman, and to quit the premises forthwith; but no notice in any form was given to Kern.

On these facts the judge ordered judgment for the plaintiff; and the defendant alleged exceptions.

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S. E. D. Currier, for the defendant.

S. Albee, for the plaintiff.

GRAY, J. Upon the view of this case most favorable to the defendant, his exceptions cannot be sustained. As Kern was but a tenant at will, and his verbal lease and surrender of possession to Wheelock included all his interest in the premises, it would seem that his tenancy at will was at an end as soon as his transfer became known to his landlord, the owner of the land, unless the latter saw fit to recognize Wheelock as his tenant. *Chandler* v. *Thurston*, 10 Pick. 209. *Cooper* v. *Adams*, 6 Cush. 90, 91. But if any tenancy at will existed after such transfer, either in Kern or Wheelock, it was terminated by the subsequent lease for years from the owner; and the utmost notice of this alienation which could be required to give it effect, and to authorize the maintenance of this process, would be a reasonable notice to the occupant of the estate to enable him to remove himself and his effects. Kern having surrendered the occupation to Wheelock, notice to the latter would affect both him and Kern; and the twelve days allowed, after the written notice to Wheelock, before bringing this action, were more than sufficient. *Pratt* v. *Farrar*, 10 Allen, 519, and cases cited. *Alexander* v. *Carew*, 13 Allen, 70. *Exceptions overruled.*

CHARLES F. GRUNDIN *vs.* ANDREW J. CARTER.

A lessee for years, who had underlet parts of the leased premises, and then had suffered his landlord to obtain judgment against him for possession, and possession to be delivered under the judgment, and had surrendered and cancelled his lease, assented in writing to a subsequent assignment of one of the underleases by the undertenant. *Held*, that he could not maintain an action against the assignee for the subsequent "use and occupation of the premises according to the terms of the covenants of said [under] lease;" although the object of all the proceedings concerning the judgment and possession obtained by the landlord, and of the surrender and cancelling of the original lease, was merely to eject an objectionable undertenant of another part of the premises; and although the landlord suffered the plaintiff to remain in occupation of part of them.

CONTRACT. At the trial in the superior court, before *Brigham*, J., without a jury, the judge ruled that the plaintiff could

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not recover on facts which are stated in the opinion; and found for the defendant. The plaintiff alleged exceptions.

H. W. Bragg, for the plaintiff.

W. S. Stearns, for the defendant.

Hoar, J. This is an action of contract by a lessor, against the assignee of his lessee, to recover an instalment of the rent reserved in the lease. The declaration sets forth the lease by the plaintiff to Russell and Batcheller, the assignment by them to the defendant, and the assent of the plaintiff thereto in writing indorsed thereon; and avers that the defendant owes the plaintiff $83.33 "for the use and occupation of the premises according to the terms of the covenants of said lease." This sum is one month's rent of the premises demised, which became due, according to the terms of the lease, on the first day of May 1866. The lease, assignment and possession of the demised premises would make a *primâ facie* case in favor of the plaintiff.

The right of a lessor to demand and receive rent from the assignee of the lessee is not a right founded on privity of contract, but on privity of estate. To support it, there must be, not an underletting, but an assignment of the whole estate of the lessee; and then the covenant to pay rent is a covenant which runs with the land. But, as the rent is an incident of the reversion, if the lessor assigns or otherwise conveys his reversion, he cannot have any claim for rent subsequently accruing; but the right to the rent is transferred to his assignee. 1 Saund. 241, note. The assignee of the lessee is only answerable upon the covenants in the lease while he is assignee; and the lessor can only enforce them against him while he continues to own the reversion. Though the tenant or his assigns cannot deny his landlord's title under which the demise was made, yet he may show that it has terminated, been transferred or otherwise extinguished. *Jackson* v. *Davis*, 5 Cowen, 123, 135. *Armstrong* v. *Wheeler*, 9 Cowen, 88. *Taylor* v. *Shum*, 1 B. & P. 21. *Birch* v. *Wright*, 1 T. R. 378. *Burden* v. *Thayer*, 3 Met. 76.

In applying these principles to the facts set forth in the bill of exceptions, we find that the plaintiff made the lease to Russell

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and Batcheller on the 1st of September 1865; that the premises thereby demised were a part of an estate which the plaintiff then held as lessee for years under Aaron H. Allen, which had been leased by Allen to him for a term ending July 1, 1868; that in March 1866 Allen obtained judgment against him for possession of them, and had possession delivered to him under the judgment; and that the plaintiff then surrendered his lease to Allen, and it was cancelled. The object which the parties had in view, to enable Allen to eject from the premises an objectionable person, to whom the plaintiff had underlet a part of the premises, does not seem to be material to the effect of these proceedings upon the title. On the 1st of April 1866, therefore, the plaintiff's whole interest in the premises had vested in Allen, and his rights as the lessor of Russell & Batcheller were extinguished, or surrendered and transferred to Allen. If the assignment of the lease by Russell & Batcheller to the defendant on the 2d of April 1866 was of any validity, the defendant's obligation under it was to Allen, and not to the plaintiff, whose estate was wholly gone. The plaintiff's assent in writing to the assignment did not make him the defendant's lessor, or create any duty toward him on the defendant's part. Nor did the fact that Allen allowed the plaintiff to remain in occupation of a part of the premises included in the cancelled lease give him any rights in the part embraced in the lease which was assigned to the defendant.

The plaintiff's right to the rent having wholly ceased, the defendant was not liable to him "for the use and occupation of the premises according to the terms of the covenants of said lease." This makes it unnecessary to consider the further objection to the maintenance of the action, that the defendant was evicted from a part of the demised premises, during the term assigned to him, by Allen with the consent of the plaintiff. *Leishman* v. *White*, 1 Allen, 489.

The ruling at the trial in favor of the defendant was right, and the judgment must be *Exceptions overruled.*

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Dennis F. Flagg *vs.* Moses A. Dow.

A recorded lease of land by T. for eight years, for a rent payable quarterly, provided that all buildings which the lessee should erect on the land should be appraised at the end of the term, and the appraised value be paid by the lessor or her successors or assigns to the lessee or his assigns; or that the lessor or her representatives might allow the lessee to retain the premises "till said sum without interest is realized by the lessee at the rent stipulated;" or might, at any time after part of said sum had been liquidated, pay the balance and resume possession. After erecting buildings on the land, the lessee, by an assignment never recorded, conveyed to F. all his title; and T. conveyed all her title to her sons, taking back a lease of the premises for her life with "power to underlet" them. At the end of the eight years T. made to F. a new lease of the premises for ten years for the same ground-rent, describing him as the assignee of the first lease, and containing a similar provision concerning the ultimate disposal of the buildings. No appraisal was then or ever made of the buildings; nor did F. ever reserve any part of the rent, but paid it to T. until she died. At her death, five years only of the term of ten years had expired. One year afterwards, her sons, having meanwhile received from F. payment of the rent each quarter, conveyed all their title to D., "subject to the rights and incumbrances, if any, belonging to or created by the tenants now on said premises." D. received the conveyance without notice, other than such as may be inferred from the record of T.'s lease to F., that F. was the assignee of the original lessee, and, after giving F. notice of said conveyance and to quit, evicted him from the premises and tore down the buildings. *Held*, that the provision in the original lease concerning a holding after the expiration of the eight years created a tenancy for years, which was not surrendered by the making of the second lease, and which continued after the second lease was concluded by T.'s death; and that F. was entitled to recover from D. a sum equal to what was the value of the buildings at the end of the eight years, less the amount of the rent from that time to the time of his eviction.

Tort for the eviction of the plaintiff from a lot of land fronting upon Charlestown Square in Charlestown, and for the value of certain buildings situated thereon. The case was submitted to the full court on agreed facts, by which it appeared that the defendant, claiming under deeds of Ebenezer Twycross and John Twycross, grantees of Martha Twycross, dated April 7, 1866, gave to the plaintiff on April 10 written notice of these deeds, and to quit the premises in seven days, and afterwards, "in the latter part of April and early in May," forcibly dispossessed him, and tore down the buildings and erected on the site thereof part of a large public house. The plaintiff, who had been in occupation of the premises ever since September 11, 1857, when he entered thereon as assignee of the firm of S. T. & G. T. Fowler, who were holding under a lease from Martha

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Twycross dated June 1, 1852, contended that these acts of the defendant were in violation of his rights as such assignee. All the facts which are material are stated in the opinion. It was agreed that, if the plaintiff was entitled to recover, the defendant should be defaulted and the case sent to an assessor to assess damages under the direction of the court; otherwise, judgment should be entered for the defendant.

J. L. English & N. St. J. Green, for the plaintiff.

C. Robinson, Jr., for the defendant.

CHAPMAN, J. The plaintiff's right to maintain this action depends upon his title under Martha Twycross. Her first lease to the Fowlers was for the term of eight years from January 1, 1852; and it contained a provision that the lessees should put up a building fronting on the adjoining square; that at the end of the lease the buildings placed or erected on the land by the lessees should be appraised, and the appraised value paid in money by the lessor, or her successors and assigns, to the lessees, or their assigns, or the lessor or her representatives might allow the lessees to retain the premises "till the said sum without interest is realized by the lessees at the rent stipulated," which was fixed at two hundred and fifty dollars per annum, payable quarterly. It further provided that the lessor or her representatives might, at any time after a part of said sum should have been liquidated, pay the balance in money and resume the premises. That part of the lease which provided that the buildings should be paid for was in substance an agreement that, at the end of the term of eight years, such buildings as might be erected by the tenant should remain as part of the real estate, and that the tenant might continue his occupancy for such further term as to receive pay for them at their value, but with a condition that the lessor might terminate this occupancy at any time by payment of the sum remaining due for the buildings. It was therefore something more than a mere covenant running with the land. The continued occupancy would be a tenancy. There was sufficient certainty as to the beginning, continuance and termination of this tenancy to make it a tenancy for years; and as the lessee, by erecting the buildings, was entitled to enjoy it without any

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further assurance, and as any form of expression which indicates the intent of the lessor that there shall be such tenancy is sufficient to constitute a lease for years, this part of the instrument is to be regarded as a lease for a further term, after the expiration of the term of eight years, in case the buildings referred to should be in existence, but subject to be defeated in whole or in part by payment of the appraised value of the buildings.

The Fowlers assigned their lease to the plaintiff in September 1857, after having erected the buildings, and in August 1859, about five months prior to the expiration of the eight years, Martha Twycross conveyed the land to her two sons. The lease being acknowledged and recorded, the sons took their title subject to it; and the fact that the assignment to the plaintiff was not recorded does not affect the plaintiff's title. The provision for the continued occupation of the premises by the lessee or his assigns till the buildings should be paid for, either in money or by the application of the stipulated rent to that purpose, would of itself authorize him to remain as tenant, and he needed no further assurance to enable him to continue his tenancy till he should receive his pay for the buildings.

But, at the same time that Martha Twycross conveyed to her sons, they gave her back a lease for life, for a nominal rent, with a grant of full power and authority to underlet the premises or any part thereof, and to employ agents or attorneys to make and renew leases, collect rents, make repairs, and generally to manage the property. The transaction was evidently a family arrangement for the settlement of her estate; for the consideration of the deed is a thousand dollars and the love and affection she had for her sons, and the money named was but a small part of the value of the property. But the court do not deem this important in the present case.

Afterwards, in pursuance of a parol agreement by which the defendant is not affected, she made a new lease to the plaintiff, dated November 1, 1859, but not executed till after the expiration of the eight years, for the term of ten years from January 1, 1860, at the same ground-rent of two hundred and fifty dollars, and with provisions similar to those of the first lease as to the

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buildings. But, as she had only an estate for life at that time, this lease was subject to be terminated by her death. All the powers granted to her in the lease for life by her sons must be construed as terminating with her estate. She died about January 6, 1865.

Although the taking of a new lease is generally to be regarded as the surrender of an existing lease, yet it is not always so. In *Van Rensselaer* v. *Penniman*, 6 Wend. 568, it was held to be a confirmation of a former lease. This construction was given to the second lease in order to secure to the lessee a compensation for buildings which he had erected on the premises, prior to the execution of the second lease, under a covenant that he should be paid for them at the end of the term. In this case, as the term of eight years had expired before the second lease was given, no part of that term could be surrendered. The second lease could only operate upon that part of the first which related to the occupation for the purpose of obtaining compensation for the value of the buildings. It did not purport to supersede the first lease in respect to that occupation, except by postponing the time of its commencement. This the parties might do as between themselves, but they could not, by their agreement, affect the rights of other parties. If Martha Twycross had retained her title in fee simple, or if she had not deceased, the arrangement would have been valid; but she had conveyed the title to her sons, and taken back from them a mere lease for her own life. She could not bind their estate by any grant extending beyond the term of her own life. After her death her sons continued to receive the rent which was due under the second lease, till April 1866. The effect of this receipt of rent as between them and the plaintiff need not be considered, as the estate of the defendant cannot be affected by it.

On the 4th and 7th of April 1866, the sons severally conveyed their respective interests in the land to the defendant. As the plaintiff's rights under the second lease had terminated by the death of Martha Twycross, nothing remained to him but his rights under the first lease; and by the terms of the lease he had a right of occupation, as has already been stated, commencing

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January 1, 1860, and terminating when, at the stipulated rate of rent, he should receive a full compensation for the value of the buildings. The buildings were not appraised; but the appraisal was not an essential part of the contract. It was merely a convenient method of ascertaining the value of the buildings. Any other convenient method might be substituted.

In April 1866 the defendant entered and took possession and expelled the plaintiff, without making any effort to ascertain the value of the buildings or tendering their value to the plaintiff, and having no knowledge of the assignment by the Fowlers to the plaintiff other than such as may be inferred from the fact of the record of the lease of Martha Twycross to the plaintiff, in which it was set forth that the buildings belonged to the lessee "by assignment of a former lease of which this is a substantial renewal." This act was a tort, and he is liable in this action to pay the plaintiff the amount which he was entitled to receive for the buildings as against him. This amount may be ascertained by finding the value of the buildings on the first of January 1860, and deducting from it the amount of the rents from that time to the time when the defendant entered. The balance, with interest thereon from the time of the defendant's entry to the time of judgment, will be the amount which the plaintiff is entitled to recover. The fact that, instead of retaining these rents in order to reimburse himself for the value of the buildings, the plaintiff paid them over to Martha Twycross, cannot avail him as against the defendant. The clause in the deeds of John and Ebenezer Twycross to the defendant, making the defendant's title "subject to the rights and incumbrances if any, belonging to or created by the tenant, now on said premises," must be construed to relate merely to such rights and incumbrances as affected the legal title. It may possibly limit the operation of the grantor's warranty, but does not enlarge the estate or rights of the plaintiff.

Under the agreement of parties, the judgment is to be for the plaintiff, and the cause is to be referred to an assessor to ascertain the amount of damages.

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Joseph Shattuck *vs.* Oliver Hastings.

A., owning a lot of land, gave a bond to B. to convey it to him whenever he should convey to A. or his assigns a certain other lot; and afterwards gave to C. a deed of it on condition that the grantee should convey it to B. "whenever tendered a like conveyance of the lot to be granted as an equivalent therefor as mentioned in the bond," and took back a mortgage of it, subject to the same condition. C., at the same time that he gave this mortgage to A., gave a deed of warranty of the lot to B., with the clause "for conditions and obligations see said deed from A. to me," and without receiving the other lot in exchange. *Held*, that by the deed from A. to C. the title to the land passed subject only to A.'s right of defeasance upon breach of the condition; and that the deed from C. to B. operated only as a conveyance of it subject to the mortgage from C. to A.

Tort, in the nature of trespass *quare clausum fregit*. The case was submitted in the superior court, and, on appeal, in this court, upon facts agreed, by which it appeared that on March 15, 1851, Patrick Holland, being owner of the *locus in quo*, gave to Horace E. Lindsay a bond to convey it to him or his assigns whenever he or they should convey to the obligor or his assigns, as an equivalent, another lot of land then owned by the obligee; that on June 1, 1853, Holland, being still owner of the *locus* and of other land also, conveyed all of the same to Benjamin F. Lindsay, taking back a mortgage of the whole with power of sale, and on the same day "conveyed the equity of redemption of said mortgage to said Horace E. Lindsay" by a deed set forth in full; and that the land stipulated in the bond between Holland and Horace E. Lindsay to be conveyed as an equivalent for the *locus in quo* had never been so conveyed. The other facts which are material appear in the opinion.

J. P. Converse, for the plaintiff.

L. Marrett, for the defendant.

Wells, J. Both parties claim title under B. F. Lindsay. The deed from Holland to Lindsay, of a larger tract including the *locus*, contained a condition that the grantee should convey the parcel now in controversy to Horace E. Lindsay, or his assigns, in fee simple, "whenever tendered a like conveyance of the lot to be granted as an equivalent therefor, as mentioned in

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the obligation" between Holland and said H. E. Lindsay. At the same time, B. F. Lindsay gave back to Holland a mortgage of the same premises, subject to the same condition, and with power of sale; and also, on the same day, as the case is stated, "conveyed the equity of redemption of said mortgage to the said Horace E. Lindsay." But the copy annexed is of a deed of warranty, with the clause, "for conditions and obligations see said deed from P. Holland to me." The defendant claims through this deed from B. F. to H. E. Lindsay. The plaintiff claims under the mortgage to Holland. By the agreement of the parties, "if the condition in the deed" from Holland to B. F. Lindsay "rendered it so obligatory on the said B. F. Lindsay to convey the *locus in quo* to the said H. E. Lindsay that no interest in the *locus in quo* passed to said Holland by the said mortgage," judgment is to be rendered for the defendant; otherwise for the plaintiff.

A deed of land upon condition subsequent conveys the fee, with all its qualities of transmission. The condition has no effect to limit the title, until it becomes operative to defeat it. Subject to this contingency, the estate will pass by deed or mortgage in the same manner and to the same extent as if no such incident were attached to it. Regarding the provision in Holland's deed to B. F. Lindsay as a condition merely, the mortgage from B. F. Lindsay would carry the title to the whole estate, subject to the right of defeasance as to the *locus*. That right is in Holland alone, and therefore cannot be set up by others to defeat his title under the mortgage, even if there had been a breach of the condition, which the case does not find.

The argument of the defendant seeks to give to this provision an effect broader than that which belongs to a condition. It is contended that by it B. F. Lindsay was bound to convey to Horace E. Lindsay, and was entitled to do so and to receive the equivalent; that he was not released from this obligation, nor deprived of this right, by his mortgage to Holland, made subject to that provision; that he alone was interested in the equivalent to be received, and therefore might waive it, and convey, as

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he did, to H. E. Lindsay, without receiving the other land in exchange.

It is unnecessary to determine whether B. F. Lindsay might have conveyed in accordance with the terms of the condition, and thus defeated his mortgage to Holland, *pro tanto;* or whether the mortgage deprived him of the right and power so to convey without the concurrence of the mortgagee; because, if he had the right to convey in fee simple, after his mortgage to Holland, it could be exercised only in strict conformity with the terms of the condition relating thereto. H. E. Lindsay acquired no rights by virtue of the condition in Holland's deed to B. F. Lindsay. His rights depended solely upon his personal contract with Holland. The purpose of the condition was to secure the performance of that contract, and protect Holland against his personal liability upon it. For that purpose, and to that extent only, if at all, would the power to convey in fee simple remain in B. F. Lindsay after his mortgage back to Holland. His deed to H. E. Lindsay, whether intended to convey an absolute fee or only the equity, appears to have been made without any reference to the contract for an exchange, and upon other considerations. It does not profess to be given in performance of the condition, nor appear to have been accepted in discharge of the contract between H. E. Lindsay and Holland. It can operate therefore only to convey the equity subject to the mortgage title of Holland which has passed to the plaintiff.

Accordingly the judgment of the superior court in favor of the plaintiff must be affirmed.

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Sylvester Phipps *vs.* Nathaniel Johnson.

In a reservation of a right of way over a lot of land for the purpose of repairing a building on an adjoining lot at all times when necessary, the provision that "said passway shall be only a foot passage for said purpose" does not definitely locate the way.

If the grantor of a lot of land reserves "the right to pass and repass over the granted premises for the purpose of repairing his building" on an adjoining lot "at all times when necessary," the grantee is entitled to reasonable notice of the intention of the grantor to make repairs, before being liable to an action for obstructing the right of way.

Tort for obstructing the plaintiff's right of way over the defendant's land by maintaining a building thereon. Writ dated November 27, 1865.

At the trial in the superior court, before *Ames*, C. J., it appeared that the plaintiff and the defendant were respectively owners of adjoining lots of land in Hopkinton, the plaintiff being the grantee of Benjamin F. Herrick, and the defendant of Oramel Martin and said Herrick; that on the plaintiff's lot Herrick, before conveying it to the plaintiff, had erected a building, which, by an error in ascertaining the dividing line, extended across said line and upon the defendant's lot, then owned by Martin and Herrick, eighteen inches at the ground and twenty-nine inches at the eaves; that in the subsequent conveyances by Martin and Herrick to the defendant there was a reservation of a right of way to repair this building, in the following terms: "And the said Herrick, his heirs and assigns, is to have the right and privilege to pass and repass over the above granted premises for the purpose of repairing his building at all times when necessary, the said passway to be only a foot passage for said purpose;" that, after this, Herrick made his conveyance to the plaintiff; and that the defendant then erected on his lot a building which, there was evidence tending to show, "was so near to the plaintiff's building as to make it inconvenient to make the desired repairs and in part almost impracticable." But "it did not appear that the plaintiff gave the defendant notice that there was any necessity to make repairs before this action was brought, or that he complained of any encroachment on the alleged right

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of way, except that the defendant's building stood too near the dividing line."

It further appeared that in February 1863 the plaintiff brought an action against the defendant in the superior court in which it was agreed by the parties that, inasmuch as it "involved a question of the boundary line between the land of the plaintiff and the land of the defendant," "the said action and all questions involved therein" should be referred to three arbitrators, whose award was returned into court in December 1864, when judgment was entered thereon; and that by this award and judgment it was determined that the plaintiff's building extended over the boundary line as above set forth, but also that the defendant's building was "placed so near said line that a space of suitable width is not left open for the use of the plaintiff" to repair his building, and nominal damages were awarded to the plaintiff for "said encroachment" on his right of way. And the declaration in the present action expressly alleged that the obstruction complained of was the maintenance by the defendant of his building in the same position in which it was at the time of said award and judgment.

The plaintiff asked the judge to instruct the jury to find specially "the width of the passage way to which he was entitled," and also to rule that "by virtue of the aforesaid award, the position of the buildings being the same now as before, he was entitled to a verdict at least for nominal damages." But the judge refused this request, and instructed the jury "that the reservation under which the plaintiff claimed did not give him the right to erect or maintain a building extending beyond the limits of his own land and encroaching upon that of the defendant, but only gave him a right to pass and repass over the defendant's land to have such access to his own building for the purpose of making repairs as would be reasonably convenient supposing his building were standing wholly on his own side of the dividing line; and that the defendant had not made himself liable in this action by placing his building as it now stands, provided he left sufficient space for the plaintiff after setting back his building so that it should stand wholly on his own

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land, to make his repairs without great or heavy increase of expense, time or difficulty, as compared with the usual mode of making such repairs." And the judge also ruled "that, notwithstanding the former judgment, it was competent for the defendant to claim and to show that the position of his building was not of itself a disturbance of any right of way which the plaintiff could hold under said reservation."

A verdict was returned for the defendant; and the plaintiff alleged exceptions.

L. H. Wakefield, for the plaintiff.

T. H. Sweetser, (*C. Meserve* with him,) for the defendant.

CHAPMAN, J. The deed of Martin and Herrick to the defendant contains the following reservation: "And the said Herrick, his heirs and assigns, is to have the right and privilege to pass and repass over the above granted premises for the purpose of repairing his building at all times when necessary, the said passway to be only a foot passage for said purpose."

This was not a reservation of a right to pass at all times; and intervals of many months or years might elapse in which there would be no occasion to make repairs. During these intervals there would be right to use the way. And as the plaintiff might need to occupy more space in passing for the purpose of making some kinds of repairs than he would need for making other repairs, the way, though a mere foot way, was not definitely located.

For all purposes consistent with this occasional right of way, the right to use the land was conveyed to the defendant. It would be construing his deed very strongly against him to hold that he is bound to keep the land free from all obstructions, at all times, so that this passage way can be used without notice. It would deprive him of the use of the land to an unreasonable extent. Nor is there any occasion to require this of him. The making of repairs requires some preparation, so that the owner of the building may, without detriment to his own rights, give reasonable notice that he is about to repair and will have occasion to use the way. Considering the purpose and character of the reservation, and construing the deed most strongly against

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the grantor, the court are of opinion that the defendant was entitled to reasonable notice that the plaintiff was about to repair, before being liable to an action for obstructing the way. If it were not so, he could not even place a cart or wagon upon it temporarily without exposing himself to an action for damages.

This decision renders it unnecessary to consider the other points that have been discussed. *Exceptions overruled.*

MARY A. JENNINGS, guardian, *vs.* DENNIS COLLINS.

The assessment of a joint tax on two parcels of land of different owners, based on a joint valuation thereof, creates no lien for the whole or any part of such tax; and no apportionment of such a tax will create a lien, unless made as a formal reassessment of the separate parcel, and based on a separate valuation thereof, with a corresponding change in the assessors' lists.

A writ of entry in behalf of minor heirs cannot be maintained in the name of their guardian, but should be brought in their name by their next friend.

WRIT OF ENTRY by the guardian of the minor heirs of Francis M. Jennings, in their behalf, to recover two lots of land in Arlington.

In the superior court it was agreed that the demanded premises, numbered lots 64 and 66, were formerly part of a large tract of land owned by Nahum Packard, which, prior to July 2, 1855, he divided into house lots numbered from 1 to 100, and, with five other of these lots, were conveyed by Packard to Jennings by warranty deed on that day; and that, prior to 1862, the latter died seised of the same. It was also agreed that in 1862 the five other lots were assessed, for taxes, to the estate of Jennings, but the two demanded lots, together with two additional lots, were assessed in one joint valuation to Packard as follows: "Nahum Packard, West Bridgewater. Number of lots, 1, 2, 64, 66. 36,260 feet. 1 house, $1700. Land, $940. Total valuation, $2650. Tax, $21.20;" that Packard represented to the assessors that he did not own lots numbered 64 and 66, and did not know who did own them; "that the assessors thereupon

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apportioned the taxes due on lots 64 and 66, and deducted the same from the tax bill of said Packard, but made no record of such apportionment, and gave the amount so apportioned to the collector, directing him to receive the same as being the amount of the tax due on the said two lots, and, if no one appeared to pay said tax, to advertise and sell the same according to law;" that the collector "without further demand sold the demanded premises on March 30, 1863, for the nonpayment of said taxes so apportioned, to George W. Lane," through whom by mesne conveyances the tenant claimed title; and that no demand was ever made on the demandant or her wards, nor any notice ever given to her or them of the sale, other than the collector's advertisement thereof, in which the demanded premises were described as follows: "Nahum Packard. Lots numbered 64 and 66 on the Packard land, so called, on a plan of 100 house lots surveyed by W. A. Mason, containing 15,000 square feet. Plan recorded. State, county, and town taxes for 1862, $3.50." And it was further agreed that "the assessor's list and books do not show the demanded premises to have been taxed separately for the amount mentioned in said collector's notice," but only "that they were taxed in connection with other lots, and then at a gross valuation;" that neither Jennings nor Packard, nor the demandant, nor any of the wards of the demandant, were ever residents of Arlington; that the demanded premises were never occupied by any one before the tenant; and that from 1855 to 1862 there were the following assessments relating to the premises: During all those years the five other lots bought from Packard by Jennings were assessed as lots, or by the aggregate number of square feet contained in them, to Jennings, or, after his death, to his estate or his heirs. In 1856 lot 64 was assessed to Packard, with certain other lots, at a gross valuation; but it did not appear to whom lot 66 was assessed. In 1857, 1858 and 1859, there was no designation of lots on the assessors' lists, and land was assessed to Jennings and Packard respectively "in the aggregate of feet." In 1860, lots 64 and 66, together with lots 1 and 2, were assessed to Packard in a gross valuation, as in 1862. How they were assessed in 1861 did not appear.

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Judgment was ordered for the demandant, and the tenant appealed.

H. W. Bragg, for the demandant.

W. E. Parmenter, for the tenant, on the point of the sufficiency of the assessment, argued: Packard, the original owner, was a nonresident. No person was in occupation of the land. No change of ownership was known to the assessors. Their lists were open to the inspection of persons liable to be taxed, and it was laches for those concerned not to have verified the assessment. The land being unoccupied and unimproved, the reasoning of the court in *Alvord* v. *Collin*, 20 Pick. 426, has some application to the facts. The assessors followed strictly the forms prescribed by the St. of 1861, *c.* 167. They described each lot by its number, and entered on their list a total tax. The statute did not require the separate valuation and tax of each lot. Then, when they first ascertained through Packard that he no longer owned the two lots in question, they apportioned the tax, and each of the two parcels became thereby subject to a lien for its portion thereof.

WELLS, J. The land for which this suit is brought, and a similar parcel belonging to Nahum Packard, were assessed together, by one joint valuation, to Nahum Packard. Packard informed the assessors that he did not own the lots numbered 64 and 66, and thereupon, by an informal apportionment, he was allowed to pay so much of the joint tax as was supposed properly to belong to his two lots. The balance of the tax, without any reassessment or change in the assessor's lists, the collector was directed to enforce against the other two lots. The first question is, whether the tax so assessed constituted a lien upon these lots which will support the title set up under the collector's deed. Gen. Sts. *c.* 12, § 22.

If the lots had all been the property of Packard at the time the tax was laid, the mere fact that he had divided the land into small lots for purposes of sale would not require the assessors to make a separate valuation of each lot. But where lands are separated, either by the use or purpose to which they are devoted, or by the mode of their occupation, or are disconnected

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in location, a tax laid generally, upon an entire valuation, cannot be made a lien upon each separate parcel, even when they are all owned or occupied by the same person. *Hayden* v. *Foster*, 13 Pick. 492. *A fortiori*, it would seem that lands in the ownership of different persons could not be included in one joint assessment. The St. of 1861, *c.* 167, requires assessors to describe by name or otherwise "each and every lot of land owned by each person," and to give the number of acres or feet in each lot of land, and the value of the same. In the present case the two parcels, Nos. 1 and 2, owned by Packard, and Nos. 64 and 66, owned by the heirs of Jennings, having been included in one joint valuation and assessment, no lien attached to either parcel for the whole or any part of the joint tax.

By a new valuation and reassessment under the Gen. Sts. *c.* 11, § 53, the land of these plaintiffs might have been affected by a lien for the amount of tax legally and specifically assessed upon them. Gen. Sts. *c.* 12, § 23. For this purpose, a distinct and separate judgment of the assessors was necessary, fixing the value of the land belonging to each owner, and the amount of tax to be assessed separately to each. Such reassessment, to be effective, should be formally made and entered upon the assessors' lists, and thus recommitted to the collector. No such proceeding was had in this case; but by an informal computation Packard's share of the joint tax was ascertained, and was paid by him, and the collector was then directed to enforce the unpaid balance of the joint tax against the land of these plaintiffs. This gave him no proper warrant or authority for the sale of the land of the Jennings estate. No title can be derived, under a sale of land for taxes, otherwise than through the lien given by statute. As the tenant's title must fail upon this ground, it is unnecessary to consider the question of the sufficiency of the collector's notice of sale.

But the guardian of the minor heirs of Jennings is not entitled to recover their land, as guardian. The suit should have been brought in the name of the heirs themselves, who may sue by next friend. Upon proper amendment of the writ in the superior court, judgment may be entered for possession in favor of the heirs.

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JULIA C. FARWELL *vs.* MICHAEL ROGERS.

A warranty deed of land, duly executed and recorded, raises a presumption that the grantor had a title which he could convey, and that he by his deed vested a seisin of the premises in the grantee.

In the absence of evidence of adverse possession of land, the seisin follows the legal title; and seisin in law carries with it the right of legal possession.

A judgment creditor, after receiving from the officer seisin and possession of land of the debtor upon which the execution was levied, conveyed it by deed of quitclaim without any covenants, and afterwards brought in his own name, and prosecuted for the benefit of his grantee, a writ of entry against one in whom was vested the title of a person to whom such debtor had conveyed the premises after the debt accrued but before the levy of the execution. On this writ of entry he obtained judgment, but never took out a writ of possession. His grantee afterwards conveyed the premises to F. by deed delivered on the land; the tenant in the writ of entry having previously made a deed thereof to the original debtor, expressed to be subject to the rights of the creditor, and such debtor having given a bond for a deed of them to R. *Held*, that F. might maintain a writ of entry, for possession of the premises, against R., who had acquired no title thereto by prescription.

WRIT OF ENTRY, dated November 28, 1865. Plea, *nul disseisin*. At the trial, before *Chapman*, J., after the introduction of evidence the material parts of which are stated in the opinion, the case was withdrawn from the jury by consent of the parties, and reported for the determination of the full court.

T. H. Sweetser, for the demandant.

H. F. French, (*J. Rutter* with him,) for the tenant.

FOSTER, J. It is a well settled rule in the law of real property, that a warranty deed of land, duly executed and recorded, raises a presumption that the grantor had a title which he could convey, and that he has by his deed vested a seisin in the grantee. In the absence of adverse possession, seisin follows the legal title, and seisin in law carries with it the legal possession. *Proprietors of Kennebeck Purchase* v. *Call*, 1 Mass. 484. *Ward* v. *Fuller*, 15 Pick. 185. *Second Precinct in Rehoboth* v. *Carpenter*, 23 Pick. 131. *Towne* v. *Butterfield*, 97 Mass. 105.

Jacob Farwell, to whom the premises were conveyed in 1833 by warranty deed by the Messrs. Gale, is the party from whom the demandant's title is derived. Aaron Hunt, a creditor of Jacob Farwell, caused the premises to be set off on execution

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in satisfaction of a note dated December 29, 1841. The judgment was rendered at June term 1843; the levy was completed, and seisin and possession of the premises, as appears by the record of the levy, were delivered to Hunt by the officer June 24, 1843; and on September 21, 1843, Aaron Hunt conveyed the premises to Isaac Farwell by deed of mere quitclaim not containing any covenants. Isaac Farwell conveyed to the demandant by deed dated November 24, 1865, and delivered on the land. This was the title upon which the demandant rested her case; and the presiding judge correctly ruled that it was *primâ facie* sufficient.

The tenant in reply introduced a warranty deed from Jacob Farwell to Maria, wife of Thomas Emerson, dated March 21, 1842; a mortgage from her and her husband to Luke Smith, dated March 31, 1843, and a quitclaim deed from them to him, dated May 24, 1843. These conveyances are relied upon by the tenant, not because he has derived any legal title under them, but to disprove the seisin of the demandant, and show a better outstanding title under them in a third person. It will be observed that the conveyance to Mrs. Emerson appears to be earlier in date than the title of Aaron Hunt and his levy; but that it was subsequent to the date of the note on which Hunt's judgment was founded.

On September 27, 1843, Aaron Hunt commenced a writ of entry against Luke Smith, in whom the Emerson title was then vested, and obtained judgment therein for the land in April 1844. This action was brought six days after Hunt's conveyance to Isaac Farwell, and was prosecuted in the name of the grantor for the benefit of Isaac Farwell, the grantee. If Hunt's conveyance to Isaac Farwell had been with covenants of warranty, the judgment in his favor against Smith would have enured to the benefit of his grantee by way of rebutter. *Wade* v. *Lindsey*, 6 Met. 407. *Cleaveland* v. *Flagg*, 4 Cush. 76. But as there were no such covenants in that deed, and it does not appear to have been redelivered, we do not perceive how that judgment could operate to confirm Isaac Farwell's title from Aaron Hunt, if at the date thereof Hunt was actually disseised

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and nothing passed thereby. *Brinley* v. *Whiting*, 5 Pick. 348. *Cleverly* v. *Whitney*, 7 Pick. 36. The judgment on the writ of entry was, however, conclusive between the parties and privies thereto without any service of the writ of *habere facias possessionem*. *McNeil* v. *Bright*, 4 Mass. 282. *Creighton* v. *Proctor*, 12 Cush. 437. It therefore established the superior validity of the title of Hunt under his levy over that of Luke Smith under the Emerson deed.

The deed from Luke Smith to Jacob Farwell, dated March 7, 1844, was made pending the writ of entry by Aaron Hunt against Smith, and was expressed to be subject to the rights of Hunt. Jacob Farwell is therefore bound by that judgment as much as if he had been the defendant therein.

There is no evidence in the case of any possession on the part of Luke Smith which rendered the deed from Hunt to Isaac Farwell void on the ground that the grantor was disseised at the date thereof. Seisin was delivered to Hunt under his levy June 24, 1843, which was after the conveyance by the Emersons to Smith; Hunt's quitclaim deed to Isaac Farwell was dated September 21, 1843; and there is nothing to show any entry on the land by Luke Smith during this interval, or indeed at any other time. We cannot, as against Isaac Farwell, infer that Hunt was disseised on September 21, when he conveyed away his title, from the fact that he alleged himself to be so in a writ of entry dated September 27; because the acts and admissions of a grantor after the execution of his deed cannot be received in disparagement of the title already vested in his grantee.

The quitclaim deed from Hunt to Isaac Farwell passed the title as against every one but a claimant under the Emerson deeds. If the deed from Jacob Farwell to Mrs. Emerson was fraudulent, and Luke Smith acquired title with notice thereof, Isaac Farwell might have maintained a writ of entry against him; or, if he were not in possession, Isaac Farwell might have peaceably entered and held the land, treating Smith's title as a nullity. After the date of the conveyance to Isaac Farwell, neither Aaron Hunt nor Luke Smith appear to have claimed any possession of the land. We cannot find any evidence of

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actual possession of the land by any one between the date when Hunt was placed in possession under his levy and that when he made the deed to Farwell. In the absence of evidence, it is impossible to presume or infer a disseisin, which would create an infirmity in a title otherwise perfect. Indeed, we are by no means satisfied that the point of an actual disseisin of Aaron Hunt at the date when he parted with his interest in the land was designed to be raised upon this report. Everything indicates that the trial proceeded upon a comparison of the legal titles of the parties.

No disseisin subsequent to the acquisition of Isaac Farwell's title will operate to defeat his deed to the demandant, because it was delivered on the land. It is familiar law that an entry by a disseisee, and the delivery of a deed upon the premises, purges a disseisin and makes the deed effectual to pass all the title originally acquired by the grantor. *Warner* v. *Bull*, 13 Met. 1.

The adverse possession of the tenant began in 1848, less than twenty years before the commencement of the present action, and is therefore insufficient. His equitable title as assignee of a bond for a deed given by Jacob Farwell in 1847 could not under any circumstances constitute a defence to a real action by the owner of the legal freehold. *Crane* v. *Crane*, 4 Gray, 323.

Judgment for the demandant.

SAMUEL KNIGHT & another *vs.* SETH J. SAMPSON & another.

A judgment debtor who has entered into a recognizance, under the Gen. Sts. *c.* 124, § 10, to "appear at the time fixed for his examination and from time to time until the same is concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon," forfeits the recognizance, if, without leave of the magistrate, he departs after his examination is finished and the magistrate has announced that the oath for the relief of poor debtors is refused him, but while the magistrate is making the certificate of such refusal, required by § 25.

A justice of the peace who is a student of law with the attorney of a judgment creditor,

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and receives some compensation for services in the office of such attorney, is not thereby disqualified to take the affidavit of the creditor required by the Gen. Sts. c. 124, § 5, to authorize the arrest of the debtor on execution; and it is immaterial that afterwards, by request of said attorney, he appears with the debtor's attorney at an adjournment of the debtor's examination, and states to the magistrate that the creditor's attorney consents to a continuance thereof.

CONTRACT on a poor debtor's recognizance. The case was submitted to the superior court, and, on appeal, to this court, on these facts agreed:

On October 4, 1864, Sampson, under arrest on an execution, entered, with the other defendant as surety, into a recognizance under the Gen. Sts. c. 124, § 10, to deliver himself up for examination before some magistrate authorized to act, giving notice of the time and place thereof in the manner provided in the statute, "and appear at the time fixed for his examination, and from time to time until the same is concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon." On December 22, at two o'clock after noon, his examination having been duly continued till that time, Sampson appeared before the magistrate, and his examination by the attorney of the judgment creditor was continued and finished. The magistrate then announced that on the evidence the debtor was not entitled to take the oath; and thereupon said attorney sent for an officer to take Sampson to jail "when the oath was refused and the execution ready and placed in his hands by the magistrate." The magistrate began to write upon the execution a certificate of his refusal of the oath; and, while he was so engaged, and before he had finished the certificate, and without his knowledge or consent, the debtor left the room, no officer being in attendance at the time. One or two minutes afterwards, at the moment when the magistrate finished the certificate, and "in season for him to hand it to him without any delay," the officer sent for by the creditor's attorney appeared. Not finding the debtor present, he remained for a few minutes; and then, as the debtor did not reappear, he went away, leaving the execution on the magistrate's table.

The plaintiff's affidavit for the arrest of Sampson on the exe-

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cution was taken by a justice of the peace, who at the time of taking it was a student of law in the office of the plaintiffs' attorney, and "received some compensation for his services in said office;" and who afterwards, by request of said attorney, appeared with the defendants' attorney before the magistrate at one of the adjournments of the examination of Sampson, and informed the magistrate that the plaintiffs' attorney consented to a further continuance thereof.

On these facts judgment was ordered for the defendants; and the plaintiffs appealed.

J. F. Pickering, (*C. D. Dunton* with him,) for the plaintiffs.

H. W. Bragg, for the defendants.

GRAY, J. The debtor, having entered into a recognizance under the Gen. Sts. *c.* 124, § 10, to abide the final order of the magistrate, was not liable to arrest until the magistrate had made and certified upon the execution an order refusing him the poor debtor's oath; and his failure to be in attendance at that time, when an officer was present for the purpose of taking him to jail, was a breach of the recognizance. *Lothrop* v. *Bailey*, 14 Allen, 514.

No disqualification is shown of the justice of the peace who took the affidavit upon which the debtor was arrested on execution. He was not the attorney of the creditor, and does not appear to have had any pecuniary interest in the case or to have received any compensation for his services therein. The student or clerk of an attorney at law does not stand in the same relation as the attorney himself to his clients. *Barnes* v. *Harris*, 7 Cush. 576. *Andrews* v. *Solomon*, Pet. C. C. 356. *Goodtitle* v. *Badtitle*, 8 T. R. 638. The case is thus distinguished from *McGregor* v. *Crane*, 98 Mass. 530, in which the magistrate who took such an affidavit was the attorney of the party.

Judgment for the plaintiffs.

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EDWARD H. THURSTON *vs.* MARTHA W. THURSTON.

If a decree dismissing a libel for divorce for the desertion of the libellee does not set forth that the dismissal is without prejudice, it is a bar to a subsequent libel of the same libellant for a divorce from the bonds of matrimony for a desertion of the same libellee which began not less than five years before the filing of the former libel.

CHAPMAN, J. According to our practice in libels for divorce, the usual form of a final decree against the libellant is, that the libel be dismissed. In this respect it is like a final decree against a plaintiff in equity. If it is not intended to be a bar to a new libel for the same cause, the decree is, that it be dismissed without prejudice. The decree in the former case was therefore a bar to the present libel, if it is for the same cause.

Whether the cause of complaint be the same in two cases cannot always be ascertained from the pleadings. It is sometimes necessary to hear evidence on the subject. In this case the libel, filed May 19, 1865, for a divorce from the bonds of matrimony, alleges that the libellee, on or about March 1, 1854, deserted the libellant without just cause, and continued the desertion for more than five years consecutively, previous to the filing of the bill. Five years from the alleged time of the desertion would expire in March 1859. The plea in bar alleges that the former libel, alleging the same cause, was filed March 19, 1863, and was dismissed with costs at April term 1863. As time is not material in the allegation of desertion, any act of desertion which began more than five years before the filing of that bill might have been proved in that case, and the decree would bar a new libel for such desertion. But an act of desertion which did not begin in time to have been continued five years consecutively before the filing of that bill could not have been proved in support of its allegations, and a new libel for such cause would not be barred by the decree. In this case, it was not pretended that there was a new desertion which occurred within five years prior to March 19, 1863, and continued less than five years prior to that time, and was continued after

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that time till five years were completed. The cause of complaint was therefore the same in both cases, and the former decree is a bar to this proceeding. *Libel dismissed.*

J. F. Pickering, for the libellant.

A. A. Prescott, for the libellee.

Inhabitants of Townsend *vs.* Inhabitants of Pepperell.

On trial of the issue of the insanity of a woman during a certain period, a witness being asked where the woman then lived, and replying that her home was with her father but she used to make visits elsewhere, his further reply that people used to have a great deal of sympathy with her is inadmissible, although offered as showing how she came to make such visits.

On trial of the issue of the insanity of a woman during a certain period, evidence of her general reputation in the neighborhood at that time as insane, and of declarations of her parents and others, since deceased, that she was then insane; and opinions of witnesses personally acquainted with her but not experts, as to her mental condition at that time; are inadmissible.

If an answer in a deposition is offered to be read at the trial only as a whole, and part of it is incompetent, the whole is inadmissible.

A record of the condition and treatment of a patient in a hospital, produced at a trial forty years after its date, by the superintendent of the hospital, as part of a series of records, of which he is the official custodian, purporting to be contemporaneously made by the attending physicians, of all cases there treated, and which it is their duty to make, is admissible in evidence, as a foundation for the opinion of an expert whether it indicates mental disease of the patient, without identifying the person who made it.

On a trial of the issue whether during a certain period a woman was so insane as to be unable to choose a settlement, a party prayed for an instruction to the jury "that the insanity which they were to find need not be complete madness, but such a disordered or unsound state of mind that by reason thereof she needed the care and oversight of a parent or guardian, or was an unfit person to be married, or, if she were a man, would not have been a fit person to be intrusted with state or municipal offices or places of trust." The judge, having already instructed them that they were to consider whether, if her mind was diseased, it was so "to such an extent as to deprive her of her volition, free will and power of choice, so as to take away from her her self-control over her mind and herself in these particulars so that she had no power to make choice of a settlement," refused to adopt the instructions prayed for, but did instruct them further "that the insanity need not amount to complete madness, and, if they should find that the degree of mental derangement was such as was indicated in the prayer, it would be very proper evidence for them to consider upon the question whether or not she had that kind and degree of mental derangement which the court had already instructed them that they must find that she had." *Held*, that the instructions given were correct; and included the substance of that prayed for, with proper modifications.

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No exception lies, if, in response to a prayer for a ruling of law at a trial, the judge adopts and gives to the jury the substance of the ruling prayed for, but declines to adopt and give illustrations of the application of it which were included in the prayer.

CONTRACT for expenses incurred in supporting Mary Gilson, an insane pauper. The issue was, whether her settlement was with the defendants or with the plaintiffs.

At the trial in the superior court, before *Putnam*, J., it appeared that she was born in Pepperell on the 19th of November 1801, and, when she became of age in 1822, her father had a settlement there; but that he afterwards removed to Townsend, where he gained a settlement in 1842 and resided until his death, and where she lived with him until in 1856 she became hopelessly insane; and that in 1858 she was put under guardianship, and thereafter supported from proceeds of her property until 1864, when, it being exhausted, she was supported by the plaintiffs as a pauper, as also she had been from 1856 to 1858.

Among evidence offered by the defendants to show that she was insane before and when she became of age and ever afterwards, was the deposition of Samuel Farrar, who, to their nineteenth interrogatory, where Mary had her home before she and her father removed to Townsend, replied that she made her home with her father, and added: "She used to visit some; [the people used to have a good deal of sympathy with her,] and she used to stay at different places, perhaps a week or so at a time, sometimes at our house; people used to invite her." On objection by the plaintiffs, the words in brackets were excluded.

Five of the nine interrogatories and answers immediately following this were as follows:

"*Int.* 20. What was the occasion of people's having a great deal of sympathy with Mary, and inviting her to stay with them for a week or so, if you know? *Ans.* She was considered unfortunate and a person to be pitied; and from a desire to better her condition, if they could.

"*Int.* 21. What do you mean by saying that she was unfortunate, and that people had a desire to better her condition, if they could? *Ans.* She had been crossed in love, as had been understood, and was unfortunate, as a great many others have

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been, and it affected her mind, folks thought, generally. I mean by unfortunate, that she could not marry the one she wanted to. Her father would not let her marry George Wright; turned him out of the house a number of times.

"*Int.* 26. When you were on the board of selectmen ten years ago, when the subject of Mary's settlement was in dispute between Townsend and Pepperell, where did her father and mother then live; and what did they or either of them tell you, relative to Mary's insanity or mental derangement, while she lived in Pepperell, and before she became twenty-one years of age? State fully all the conversation. *Ans.* They lived in Townsend. The old gentleman regretted that he had interfered with Mary's wish to marry George Wright; he considered that the commencement of her trouble. Aberration of mind or craziness grew worse and worse till the trouble with Tyler. When she was at the paper-mill she would put her feet into cold water, and sit with them out of the window. The climax, when she came from Maine, was raving. This was in warm weather; am of opinion this was in 1822, but not certain.

"*Int.* 27. Do you know what was the common speech of people who were well acquainted with Mary and lived in her neighborhood, relative to her sanity or insanity before she became of age? If yea, what was it? *Ans.* I know what some people used to say. I inquired all round among the elderly people, such as Dr. Walton and Esq. Jewett. The doctor said he had been their family physician, and knew them intimately; knew the case of Mary, and did not consider her competent, at the time she became of age, to gain a residence in any other town, or in her own right; considered her crazy.

"*Int.* 28. What did the people in the neighborhood of Mary, and those who were acquainted with her generally, say of her sanity or insanity before she became of age? *Ans.* Said she was insane. I never heard but one person say she wasn't."

All of these, on the plaintiffs' objection, were excluded. In regard to the twenty-seventh answer, it appeared that Dr. Walton and Esq. Jewett were both dead before the taking of Farrar's deposition.

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The defendants further offered the deposition of Eleanor E. Shattuck, containing, among others, the following interrogatories and answers:

"*Int.* 10. Do you know of Mary's being insane or crazy before 1822? *Ans.* Yes; because I was married in 1819, and she was crazy before that.

"*Int.* 14. How was she different from the other girls about her age, between 1815 and 1822? State what you know. *Ans.* Because she was lovesick, and crazed too. I says, 'Mary, they say you are crazy lovesick.' She says, 'I am not lovesick, but I shall be crazier if Tyler goes down east.' She did grow worse, and ran away. Tyler did go down east, and she stole away after him. She was very crazy afterwards. She would stamp round and tear.

"*Int.* 25. Do you know whether or not Mary was capable of taking care of herself at all times from 1818 to 1822? *Ans.* I shouldn't suppose she was. It appears to me that when she became seventeen or over she became more crazy; seems to me so."

On the plaintiffs' objection, these also were excluded.

One of the defendants' witnesses having testified that Mary was a patient in the Massachusetts General Hospital in 1825, the plaintiffs, to show that she was not there as insane, called Benjamin F. Shaw as a witness, who testified that he was and for fifteen years had been superintending physician of that hospital, and that it was not an insane hospital; and who produced a written book and said that it was a record of the medical history of the cases at the hospital for a period embracing 1825; that he did not know who made any of the entries, nor when they were made, but found the book among the regular records of the hospital; that in regular course of business of the hospital records were kept of all cases, and this book was one of a series; that he was the regular custodian of these books, and it was the duty of the physicians in charge of patients to enter in them the history of the cases as they came under their charge at the hospital, and he had no doubt that the records in this case were made in the usual way. The book contained the name of Mary Gilson,

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as having entered the hospital July 25, 1825, and been discharged relieved September 10, 1825, and what purported to be an account of her sickness previous to entering, as given by her, and a daily account of her condition at the hospital, (apparently taken in part from her own statements,) and an account of the medicines there administered to her. The plaintiffs proposed to ask the witness if there was anything relating to Mary, either in the account of her condition or of her treatment, which indicated mental disease or insanity. The defendants objected to the witness' stating conclusions which he had made from reading the book; and the plaintiffs then offered the book itself in evidence, and, against the defendants' objection, it was admitted, and the questions were permitted to be put; and the witness answered in the negative.

The judge, in charging the jury, among other instructions not objected to, instructed them "that, upon the circumstances of this case, it would not be sufficient merely to show mental derangement in Mary Gilson at the time she became of age; and that it was not every degree of mental derangement which would prevent her from gaining a settlement, or which would make her so insane as that her settlement would follow that of her father; that they were, in the first place, to consider all the evidence in reference to her peculiarities of conduct and mind, and say whether they were the result of ill-health or indicated mental disease; and, if the latter, whether to such an extent as to deprive her of her volition, free will, and power of choice, so as to take away from her her self-control over her mind and herself in these particulars, so that she had no power to make choice of a settlement; that, if it did, it incapacitated her from gaining a settlement, and she might then be considered so insane as that her settlement followed that of her father."

The defendants then prayed for an instruction, "that the insanity which they were to find need not be complete madness, but such a disordered or unsound state of mind that, by reason thereof, she needed the care and oversight of a parent or guardian, or was an unfit person to be married, or that, if she were a man, she would not be a fit person to be intrusted with state or

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municipal offices, or places of trust." The judge refused this prayer, but did instruct the jury that the insanity need not amount to complete madness; that if they should find that the degree of mental derangement was such as was indicated in the prayer, [reading it to them,] it would be very proper evidence for them to consider upon the question whether she had or not that kind and degree of mental derangement which the court had already instructed them that they must find that she had."

The jury returned a verdict for the plaintiffs; and to the exclusion of the evidence as above recited, and to the instructions of the court, so far as they were in conflict with the instruction asked for, the defendants alleged exceptions.

D. S. Richardson & L. Wallace, for the defendants. 1. The exclusion from Ans. 19 in Farrar's deposition of the statement that the people used to have a good deal of sympathy with Mary was wrong. It was explanatory of the rest of the answer; and was a foundation for Int. 20, 21, which were admissible for the same reason.

2. Evidence of family and general reputation, such as in Int. and Ans. 26–28 in Farrar's deposition, was competent. 1 Phil. Ev. (4th Am. ed.) 248, Pedigree. *The King* v. *Eriswell*, 3 T. R. 707. *Haddock* v. *Boston & Maine Railroad*, 3 Allen, 298.

3. The excluded portions of Shattuck's deposition were admissible in part.

4. The hospital record was not one required by law. As to the facts recorded, the defendants had no opportunity of cross-examination. They therefore were not a sufficient foundation for the opinion of an expert. Her case may have been treated as there recorded, but such treatment was only the result of the opinion of the then attending physician, and not a sufficient foundation for the opinion of Dr. Shaw as to what that treatment did or did not indicate in the case of that precise patient.

5. The rule laid down by the judge, that the defendants must show that Mary's mental derangement was such as to deprive her of her volition, free will and power of choice so far as to render her incapable of making choice of a settlement, was incorrect; for a certain degree of weakness of mental power, not

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idiocy or loss of will, but lack of proper understanding to guide the will, was all that was requisite. Chit. Med. Jur. 346. Ray Med. Jur. *c.* 3, Imbecility. The instructions which the defendants asked were proper measures of the requisite degree of mental derangement, and should have been given as such. *Upton* v. *Northbridge*, 15 Mass. 237. *Buckland* v. *Charlemont*, 3 Pick. 173. *Hopkinton* v. *Upton*, 3 Met. 167. *Breed* v. *Pratt*, 18 Pick. 115. Under the rulings in the present case the verdicts in *Upton* v. *Northbridge* and *Buckland* v. *Charlemont* would have been impossible. In those cases the rulings defined want of understanding, not loss of will, as the test. The true rule here, as in those cases, was, not whether Mary had lost all power of volition or self-control, but whether her mind was so far deranged as not to be guided by sufficient intelligence to enable her to enter upon and discharge the duties of life, as an emancipated person capable of trusting in, relying on, and taking care of herself.

T. H. Sweetser & F. A. Worcester, for the plaintiffs.

CHAPMAN, J. The subject of the controversy in this case was the insanity of Mary Gilson in 1822, when she became of age. The testimony of Mr. Farrar in his deposition, that the people used to have a good deal of sympathy with her, was properly ruled out, because it was not pertinent to the issue. The opinions and hearsay statements in his other answers were also excluded properly. The same remark applies to Mrs. Shattuck's answers, except a part of the fourteenth. But this answer was offered as a whole, and the part that is competent was not offered to be read separately from the rest.

The records of the hospital were properly admitted in evidence. *Kennedy* v. *Doyle*, 10 Allen, 161.

The question presented to the jury by the instructions of the court was, in substance, whether Mary Gilson, by reason of insanity, so far lost her self-control that she had no power to make choice of a settlement. The request for instructions contained illustrations which the court properly declined to adopt. Its substance was adopted, with proper modifications.

Exceptions overruled.

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Inhabitants of Ashland *vs.* Inhabitants of Marlborough.

To prove that a person was diseased when he enlisted, evidence is not admissible, in an action to which he is not a party, of his statement, shortly before enlisting, to a witness not an expert, of what a physician had told him concerning his health; nor of his statement, afterwards, to this witness, that he was diseased before he went into the army; nor of the opinion of the witness that before enlisting he did not appear like a well man.

Contract for expenses of supporting William H. Maynard and his family.

At the trial in the superior court, before *Brigham*, J., it was admitted that Maynard had a settlement in Marlborough formerly; and the question was, whether the St. of 1865, *c.* 230, § 1, transferred it to Ashland. On this question the facts were so agreed that the only issue for the jury was, whether Maynard, who was mustered into the military service in July 1861, on the quota of Ashland, and was discharged in January 1862 on account of chronic inflammation of the kidneys, and died in July 1865, did or did not become disabled from disease contracted while engaged in such service.

Among other evidence offered, and admitted against the objection of the defendants, one witness, not a physician, testified that Maynard, while in his employment before enlisting, said one day that "he had seen Dr. Jackson, who told him he had got a bad thing on him, and that his kidneys were diseased;" and that, another day, after Maynard had been discharged from the service, the witness asked him what ailed him, and he said "his old complaint before he went into the army;" and another witness, who also was not a physician, testified that Maynard, before enlisting, "did not appear like a well man."

The jury returned a verdict for the plaintiffs; and the defendants alleged exceptions.

G. A. Somerby & W. B. Gale, for the defendants.

T. H. Sweetser & T. C. Hurd, for the plaintiffs.

Chapman, J. The question in issue between the parties was, whether Maynard, who enlisted into the service of the United States on the 2d of July 1861, became disabled by disease con-

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tracted in the service, or whether he had the disease before he enlisted. One species of the evidence which was offered to prove that he was diseased before he enlisted was his own language. The principle which applies to such evidence is stated in *Bacon* v. *Charlton*, 7 Cush. 586. Evidence of the usual and natural expression of present feelings or emotions is admissible, though it consist wholly or partly of words. But such evidence is not to be unnecessarily extended, and is not to include narration of what is past. A physician, who is called as an expert, may testify to the statements which a sick or injured person made to him as his patient, for the purpose of obtaining his professional aid, as to the character and seat of his injuries and sensations, and describing his condition and symptoms. *Barber* v. *Merriam*, 11 Allen, 322. But a physician's testimony cannot include a recital of past events which his patient made to him. *Chapin* v. *Marlborough*, 9 Gray, 244. *Emerson* v. *Lowell Gas Light Co.* 6 Allen, 146.

A person who is not an expert may testify to the acts and appearance of another which indicate disease or disability, or the contrary; but may not give opinions on the subject.

Upon the principles above stated, the evidence of Maynard's statement as to what Dr. Jackson had told him; and as to his having had a complaint before he went into the army; and the opinion of a witness who was not an expert that he did not appear like a well man; were inadmissible.

It is not necessary to state the application of these principles to every particular of the evidence offered, for upon a new trial the evidence may be varied; and the principles stated are sufficient guides in the admission or exclusion of evidence.

Exceptions sustained.

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PATRICK MCGUIRE *vs.* MICHAEL MCDONALD.

On trial of an action for assault and battery, a material witness for the defendant being asked on cross-examination, for the purpose of showing that he was under a bias against the plaintiff, whether he did not express satisfaction at the plaintiff's injuries and sing a derisive song under the plaintiff's window while the plaintiff was in bed suffering from them, denied that he had ever done anything of the kind. *Held*, that it was thereupon competent for the plaintiff to prove that, while he was in bed suffering from the injuries, the witness did twice sing such a song under his window, and that he heard the singing, and that the witness clapped his hands at the conclusion thereof.

TORT for assault and battery. Answer, that the defendant acted in self-defence. Trial in the superior court, before *Ames*, C. J.

A witness called by the defendant having given testimony tending to show that the plaintiff was the aggressor, was asked these questions on cross-examination, for the purpose of showing that he was under the influence of a feeling unfriendly to the plaintiff: "Did you not express satisfaction on finding that the plaintiff was hurt? And did you not derisively sing under his window, while he lay sick in his bed, something about him to the effect that McGuire is lying low?" The witness replied in the negative; and denied that he had ever done anything of the kind. For the purpose of contradicting the witness, and showing bias and prejudice on his part, the plaintiff was then permitted, against the defendant's objection, to offer evidence tending to show that twice, soon after the assault, the witness did sing a derisive song under the windows of the plaintiff's house, about the plaintiff's lying low, and did also clap his hands at the close of the song; and that the song was heard by the plaintiff, while suffering in bed from the effects of the blows received from the defendant.

The jury found for the plaintiff; and the defendant alleged exceptions.

W. S. Stearns, for the defendant, cited *Hathaway* v. *Crocker*, 7 Met. 266.

A. V. Lynde & W. P. Harding, for the plaintiff.

CHAPMAN, J. The ruling is sustained by the recent case of *Day* v. *Stickney*, 14 Allen, 255. *Exceptions overruled.*

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ARTHUR M. BRIGGS *vs.* JOHN B. DEARBORN.

The responsibility of an officer, who attaches a boat, for articles contained therein, but not forming part thereof at the time of the attachment, is merely that of a bailee without hire.

TORT for conversion of an anchor, a jib-sheet, some trucks, fishing lines and leads, and some iron dross used as ballast of a sailboat, all as enumerated in a schedule annexed to the declaration.

At the trial in the superior court, before *Ames*, C. J., these facts appeared: On July 2, 1864, the boat was in this plaintiff's possession, when the defendant, a deputy sheriff, attached it on a writ of one Caldwell against this plaintiff, and removed it to a wharf about a mile distant, used by Caldwell, whom the defendant made keeper. The articles in question, together with a flag and some cushions, were in the boat at the time of the attachment, and were moved with it. Late in the autumn of 1864 the boat was stripped and placed on shore under cover. The iron ballast, which weighed between one and two tons, was piled on the wharf; and during the following winter and spring a great part of it was "lost or taken away." At some time, but precisely what time did not from the bill of exceptions appear, "the defendant's keeper" delivered the flag and cushions to this plaintiff, "who received them and inquired for the fishing lines, and was told that Caldwell had them." "The fishing lines and leads belonged to the boat, and were sold originally by Caldwell to Briggs with the said boat and other articles." In May 1865 judgment was rendered for this plaintiff in Caldwell's action against him, and he "thereupon claimed the said boat, but the articles above named were missing." "At or about the date of the replevin hereinafter mentioned," he made demand on this defendant for the missing articles, which demand was not complied with; "and it did not appear that the defendant then had them in his possession." On July 1, 1865, the plaintiff replevied the boat, and, in March 1866, recovered judgment in his action of replevin; and then, in May 1866, brought this action. "There was no other evidence of any conversion by

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the defendant, except the fact that the articles were on board at the time of the attachment and were not returned when the boat was replevied." "Evidence was offered by both parties as to the ownership and the value of the said articles."

The plaintiff requested the judge to instruct the jury "that putting a keeper over said boat, and taking charge, and continuing possession of the same, would make the defendant liable for everything on board at the time of the attachment in said action of *Caldwell* v. *Briggs;* that the ballast in the boat was a part of the boat, and was held with it by said attachment; that, if the defendant retained possession of the boat and ballast until winter, and then the ballast was removed to the wharf, and there left without notice to the plaintiff, and the same was lost, the defendant was liable; that no demand and refusal were necessary."

But the judge declined to give these instructions, and instructed the jury "that, on the termination of the suit of *Caldwell* v. *Briggs*, it became the duty of this defendant to return to Briggs not only the boat, but all apparel, tackle and furniture belonging to it; that if the schedule filed by this plaintiff contained any articles belonging to the boat, included in the attachment and not given up on the termination of that attachment, the defendant was liable for their value in this action; but that, as to any other articles belonging to this plaintiff, on board of the boat at the time of, but not included in, the attachment, the defendant was under no obligation to provide at his own expense another place for their storage, or to send or carry them to the plaintiff's house or place of business; nor would it be proper for him to throw them overboard, or leave them, without any care or oversight, on the shore." And he further instructed them "that, if the defendant did not use or interfere with such articles, and only took such possession of them as resulted incidentally from attaching the boat; if he did not remove the boat to an inconvenient or unreasonable distance; if the articles merely remained in the place where the plaintiff himself had put or deposited them; if the plaintiff could have had them at any time on call; and if there was on the part of the defendant and his keeper no exclusion of

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the plaintiff from access to the articles whenever he chose; the attachment and custody of the boat would not of itself constitute an unlawful conversion of such articles." And the judge added "that if, on the approach of winter, it became a reasonable and proper thing to do, having in view the safety and proper care of the boat, to strip and dismantle her, and put her on shore under cover, the defendant would have a right to take out the ballast and pile it on the wharf, and could not be held responsible for any of said ballast or other articles not attached that should be lost or mislaid, without proof of want of ordinary and reasonable care on his part in the custody of the same, provided the jury were satisfied that the plaintiff could have taken them at any time on request, and that there was no intention on the defendant's part to keep them out of his possession or otherwise to deprive him of them."

The jury found a verdict for the plaintiff as to a part only of his claim; and he alleged exceptions.

W. P. Harding, for the plaintiff. 1. The boat and all it contained being the property of the plaintiff when attached and carried away by the defendant, the conversion, if any, was complete, and no demand was necessary in order to sustain this action. *Woodbury* v. *Long*, 8 Pick. 544. The case does not fall within the rule in *Harding* v. *Coburn*, 12 Met. 342. Caldwell, being the defendant's keeper, was bound to know whether the defendant took any, and what, part of this plaintiff's property, and to surrender it. The evidence shows that he did in fact surrender the flag and cushions.

2. Even if demand was necessary before this action, that made on or about July 1 was sufficient, and the defendant's neglect to return thereupon all that was carried away with the boat was a conversion. *Bowen* v. *Sanborn*, 1 Allen, 391. That the articles were not then in the defendant's possession is no justification, if he or his keeper ever exercised any control over them.

3. The defendant did not use ordinary care in putting the iron on the wharf and suffering it to remain there in such a position that it could be lost during the winter and spring.

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J. F. Pickering, (*C. D. Dunton* with him,) for the defendant. The first part of the instructions which the plaintiff asked for was unreasonable without proof that all the articles in question were attached, or that the plaintiff was excluded from access to those which were not. *Drake* v. *Curtis*, 1 Cush. 395. If the articles in question were attached, a demand was necessary. As to the ballast, it was not a part of the boat, and so was not attached; but, if otherwise, the verdict was a general one, and covers the liability of the defendant in respect to all the articles which were the subject of the action.

WELLS, J. As to any articles that were attached by the defendant, and not returned upon the dissolution of the attachment, the jury were rightly instructed that the defendant would be liable for their value in this action. As to any other articles that went into the possession of the defendant with the boat, he was a mere gratuitous bailee thereof. His possession of them was not tortious, as it resulted incidentally from the attachment of the boat. It was from the plaintiff's own choice or neglect that they were left with the boat in the hands of the officer. He can hold the officer, therefore, to no higher degree of responsibility and to no other responsibility than that of a bailee without hire. As we understand the instructions of the court below, they were adapted to this view of the plaintiff's rights, and properly presented the principles of law applicable to the facts. If the defendant has suffered any grievance, it was at the hands of the jury, and not of the court. *Exceptions overruled.*

SAMUEL S. WEED *vs.* EBENEZER D. DRAPER & others.

W. and D. made a written contract, the first clause of which stipulated that D. should build without expense to W. six machines under a patent owned by W., and, whenever either should sell "a machine out of said six or other machines D. may build under said patent," W. should have a share of the proceeds, and D. the balance; and another clause fixed a minimum price per machine. The second clause provided that D. should build "any number of said machines more than six that W. may order, if W. does not order more than twelve at any one time;" and it was agreed that, in event of such order, D.

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should build "two of them each month thereafter, until the whole order is filled." A further clause provided that either might terminate the contract on four months' notice to the other; "but, when notice is given, all orders up to the end of that time which have been given are to be filled," "and all machines not completed to be completed;" and, if such notice should be given by W., "all machines which W. orders, together with any others which D. may have built or may be building at the time notice is given, to the number of six, are to be taken by W., and paid for" at a certain rate; but "if notice is given by D., then for all machines ordered or built or being built at the time the contract terminates, D. is to take the same and pay W. therefor" a certain sum "apiece, or deliver the same to W. within one month after the termination of the contract, by W.'s paying D. therefor for each machine" a certain sum. And finally it was agreed that, "if W. is not paid the sums above stipulated by D. on the sale of each and every machine, then W. shall have the right to terminate this contract at once, without notice." Four of the six machines being finished, and the two others partly built, D. wrote to W. that after finishing the six a new arrangement would be necessary on account of the advance in price of material and labor. W., a few days later, gave D. an order for twelve additional machines. D. soon afterwards gave W. a formal notice for termination of the contract in four months; and then finished the two machines; and refused to build any of the twelve. Part of the six finished were sold, and the proceeds divided under the contract; and part remained unsold in D.'s hands. *Held*, 1. that the clause relating to termination of the contract by either party on four months' notice did not apply to the six machines stipulated for in the first clause, and that D. was under no obligation to pay W. anything on account of either of them until after its sale; 2. that D.'s agreement to take "all machines ordered or built or being built" at the time the contract should end by notice from himself did not embrace the twelve machines ordered by W. but never begun to be built; but 3. that W. could hold D. liable in damages for failing to build two machines per month up to the end of the four months in partial execution of such order.

CONTRACT. In the superior court facts were agreed as follows: The defendants, who were partners, doing business as machinists, entered into a written contract with the plaintiff on November 10, 1863, which recited that, whereas the plaintiff had obtained letters patent for an improvement in sole-cutting machines, and the defendants desired to build and sell such improved machines, the defendants agreed to build six such machines without any expense to the plaintiff, except that he should furnish a set of patterns for the same, and "to finish, ready for immediate use, at least three of said six machines within two months from the day the patterns are furnished," "and all within three months from the day the patterns are so furnished;" and continued as follows:

"It is further agreed that, when said firm, or either of them, sells a machine out of said six or other machines they may build under said patent, said Weed shall have $140 out of the pro-

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ceeds of sale of each and every machine so sold, as soon as the sale is made, the proceeds of sale in all such cases to be paid over and into the hands of said firm by the person or persons who purchase a machine or machines; but when said Weed sells a machine, either out of said six, or any other machines said firm may build, then said Weed is to have out of the proceeds of sale of each and every machine so sold $160, the proceeds of sale in all such cases to be paid over and into the hands of said firm by the person or persons who purchase a machine or machines, except as hereinafter stated, and the proceeds of sale over and above said $140 and $160, as aforesaid, are to be and belong to said firm.

"And it is further agreed that said firm is to build any number of said machines more than said six that said Weed may order, if said Weed does not order more than twelve at any one time; and said firm is to have the right to build any number of machines, over and above what said Weed may order, as they may see fit to build, provided that said Weed shall have out of the proceeds of sale of each and every machine $140, if said firm or either of them sells, and $160 if said Weed sells, and that too as soon as said sale or sales are made.

"And it is further agreed that, if said Weed shall order any number of machines, not more than twelve, said firm is to build two of them in a complete and workmanlike manner, and ready for immediate use, each month thereafter, until the whole order is filled.

"And said Weed is to have the right to sell of all machines built by said firm as many as he can; and said firm is to have the same right."

"And said Weed is to have the right to take a machine at any time by paying said firm $140.

"And said firm is to have the right to build and vend any number of said machines, provided for each and every machine built and sold said Weed receives the amounts above stated, and at the time above stated, from said firm.

"And it is further agreed that, if said firm, or either of them, shall sell a machine to any person or persons on credit, then said

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Weed is to receive $140 immediately, the same as though said sale had been for cash.

"It is also further agreed that either party to this contract may terminate it by giving the other four months' notice; but, when notice is given, all orders up to the end of that time which have been given are to be filled as above stated, and all machines not completed to be completed in the manner above stated; and all machines which said Weed orders, together with any others which said firm may have built or may be building at the time notice is given, to the number of six, are to be taken by said Weed, and paid for at the rate of $140 apiece within one year after the termination of the contract, provided said notice is given by said Weed; but if notice is given by said firm, then for all machines ordered or built or being built at the time the contract terminates, said firm is to take the same and pay said Weed therefor $140 apiece, or deliver the same to said Weed built in a complete and workmanlike manner, and ready for immediate use, within one month after the termination of the contract, by said Weed's paying said firm therefor for each machine $140 within six months after the termination of the contract, the same to be at the option of said Weed, which shall be done; if said firm takes the machines as above, said Weed is to have the right to sell as many of them as he can, and for every machine so sold said Weed is to receive the sum of twenty dollars as soon as the same is sold.

"And it is further agreed that, if said Weed is not paid the sums above stipulated by said firm, at once, on the sale of each and every machine, then said Weed shall have the right to terminate this contract at once, without notice and without injury to any damages that may have accrued to him by reason of any breach of this contract by said firm. And it is agreed that no machine is to be sold for less than $300."

Under this contract the defendants proceeded to build six machines, the plaintiff furnishing the patterns; but during the work the defendants, on May 12, 1864, wrote to the plaintiff: "Stock and labor have advanced so much that we shall be under the necessity of making a new arrangement after completing the

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first six machines. If you can possibly spare the time, would like to have you call on us."

The plaintiff replied on May 18: "You requested me to go to your place. It is not convenient for me to go now unless there is something urgent, but I will go in a short time." "While in Canada I got a number of orders for machines, and have agents there who will do all that can be done in selling them for me. I shall now pay my whole attention to selling and setting up machinery. Please finish off those now begun as soon as possible; also be getting the castings for more. I shall want twelve more before you will be able to finish them. Please hurry them as fast as possible." "Please let me know if it will be convenient for you to make the patterns and machines for me. Write soon."

The defendants answered on May 24. After receiving their answer, four of the six machines having then been finished, the plaintiff had an interview with them, at which they said to him that they did not regard his letter of May 18 as an order for additional machines under the contract, and asked him if he did; and he replied that he did, "and stated that he wanted them to build twelve additional machines at any rate, and wished them to consider him as then giving an order for twelve more machines, if his letter were not such an order."

The defendants afterwards wrote to the plaintiff on June 22: "We can finish the six machines without a pulley pattern, but shall need one before making any more machines. You will recollect that we wrote you May 12, and again on May 24, to the effect that we could make no more machines after the first six without a new arrangement, on account of the advance in price of stock and labor. We intended that as a notice of termination of contract; but if it was not a legal notice, then we hereby give notice that we shall terminate the contract dated November 10, 1863, according to the terms therein specified, viz.: in four months from this date."

The defendants then finished the other two of the six machines; but did not make the twelve ordered by the plaintiff, nor any of them; and refused to do so.

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Four of the six machines were sold and the proceeds divided pursuant to the contract; the two others remained unsold.

The plaintiff, before commencing this action, gave notice to the defendants "that he should look to them to pay him $140 on each and all machines either made, being made or ordered, sold or not sold, claiming these sums as payable to him in consequence of the defendants' having terminated the contract, and of the provisions of said contract giving him a certain option in such case."

At the trial, before *Putnam*, J., without a jury, there was no evidence that any of the additional machines, if built as requested by the plaintiff, could have been sold at any price; nor any evidence as to the value of the two machines remaining on hand; nor of any opportunities to sell them at the price named in the contract, or at any price.

As to the claim of the plaintiff that the defendants were liable for not building additional machines, the defendants denied any breach of contract on their part, or any liability to the plaintiff. And, as to so much of the claim as referred to the two machines built and not sold, they contended that none of the six machines were embraced or referred to in that clause which provided for a termination of the contract by notice given by either party; that, if so embraced, the sum payable in respect thereof was payable only after the machines should be sold; and that, before such sale, there would be no consideration to support a promise by the defendants to pay the plaintiff $140 in respect to either of them.

Upon these facts the judge ruled, *pro formâ*, that the plaintiff was not entitled to recover, and found for the defendants. The plaintiff alleged exceptions.

B. C. Moulton, for the plaintiff.

F. A. Brooks, for the defendants.

Wells, J. The contract provides for the manufacture and disposal of six machines; and for a further continuance of the business under orders from the plaintiff, or by the voluntary undertaking of the defendants. The stipulations in regard to sales, division of the proceeds, the rights of the respective par-

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ties and their relation to the business during its continuance, extend to the whole manufacture, whether of the first six machines or of any subsequently built. The difficulty arises out of the clause relating to the termination of the contract and providing what shall be the rights of the respective parties thereupon.

We are satisfied that this clause, providing for a termination of the contract by either party, relates wholly to the subsequent business continued under orders or otherwise, and does not affect the agreement for the first six machines. That could be rescinded only by the plaintiff, upon failure of the defendants to make payment for sales, under another clause.

Upon the report, we think we must take the fact to be established that the defendants made their letter of June 22 the formal notice of termination; and that their previous communications were merely intimations of their purpose to do so. Also that the personal interview after the plaintiff's letter of May 18 rendered that letter equivalent to an order for twelve additional machines.

We are unable to give any force to the limitation of orders to the number of twelve machines, inasmuch as the provisions for termination limit the time for closing the business to the period of four months, and the defendants were under no obligation to construct more than two machines each month.

The defendants having given the notice to terminate the contract, the question is, What obligations did they thereby assume?

1. As to the six machines, their obligations are not changed. Those were absolutely provided for, and the defendants owe nothing on account of them until they are sold.

2. Of the twelve machines ordered, none were built and none were "being built at the time the contract terminated." The provision is, that "for all machines ordered or built or being built" the defendants are to "take the same and pay said Weed therefor $140 apiece." This language seems to imply the then present existence of some specific article, capable of being taken and paid for. In the other alternative, which the plaintiff might elect to enforce upon such termination, the plaintiff was himself

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to take the machines "ordered or built or being built," and the defendants were to "deliver the same to said Weed, built in a complete and workmanlike manner and ready for immediate use, within one month after the termination of the contract." As the defendants were only bound to construct machines at the rate of two each month, this provision could not have been understood, nor intended, to apply to an entire order of twelve machines, without regard to the progress that might have been made in their construction at the time the provision should become operative.

Taking the whole clause together, we think that the provision to take and pay for machines must, in each instance, be understood to apply to machines then in actual existence. The terms "ordered or built or being built" serve to extend the provision to machines begun as well as those completed within the time, and to machines undertaken by the defendants under the permission given in the contract, as well as those expressly ordered by the plaintiff. The bare order of the plaintiff, in no part executed by the defendants, cannot be construed as twelve machines to be taken and paid for by them; neither can it be treated as so many machines as the defendants might or ought to have constructed before the termination of the contract.

3. But the plaintiff is entitled to damages for the breach of the contract to construct the machines so ordered, at the rate of two in each month from the date of such order to the termination of the contract. Although the report states that there was no evidence as to the value of machines, nor that they could have been sold if manufactured; yet, as the case does not seem to have been tried in view of the construction of the contract which we have adopted, it seems proper that the plaintiff should have the opportunity to prove his damages. The provisions in regard to termination give the plaintiff certain advantages, or would have done so if the defendants had complied with its requirements on their part, which may bear upon the question of damages for its breach by them; and the plaintiff is entitled to whatever benefit this may give him in considering the question of the damages. *Exceptions sustained.*

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John Perkins *vs.* Amasa W. Bailey.

A cloth covering of the bed of a billiard table which can be removed without injuring the table is not so annexed thereto as to be inseparable by one who put it there under a contract of sale which he has a right to rescind.

One who has been induced to sell and put on a billiard table a removable cloth covering by fraudulent representations of the vendee, who was in possession of the table, that he was the owner thereof, may rescind the sale and resume possession of the cloth, although he sold to the same vendee another table at the same time, and took from him a mortgage of both tables as security for the payment of the price of the second table and of the cloth and his labor.

The owner of a billiard table, who, under an executory contract for the sale of it to the keeper of a billiard room, leaves it in the possession of such keeper, has no right of action against a person who takes from it a removable cloth covering, which, by fraudulent representations of a partner of such keeper, such person had been induced to sell to such partner and to put thereon.

Tort for conversion of the cloth coverings of two billiard tables. Trial in the superior court, before *Reed*, J., who made a report thereof substantially as follows:

The evidence tended to show that the plaintiff, owning two billiard tables, made a contract with Alfred Goodwin, who kept a billiard room in which they were placed, that the latter should take and use them and pay to the plaintiff the interest on their agreed price and a certain sum annually towards payment of that price, and that the property in them should pass to him upon his completion of such payment; that Goodwin, while using the tables under this contract, made an agreement with Ichabod McKnight that the latter should put two new tables into the room and new coverings on the two old ones, and divide with him the care of the room and the profits of the business, and McKnight thereupon bought of the defendant a new table and employed the defendant to put new coverings on the old ones, representing them as his property, and gave to the defendant a mortgage of all three tables as security for his payment; that soon afterwards McKnight absconded, and the defendant "went to the billiard room and took possession of his property therein" and agreed with Goodwin that the latter should keep the same for him, "and, during continuance of said Goodwin's term, and while he was continuing to pay interest on

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the price of said tables, came and took away the new table, and removed and carried away the coverings which he had placed upon the old tables," which "were so tacked upon and fastened to the tables that they might be, and were, so removed as to do no injury to the tables."

The judge ruled that this evidence would not sustain the action and directed a verdict for the defendant, and the plaintiff alleged exceptions.

A. V. Lynde & W. P. Harding, for the plaintiff.

H. W. Bragg & J. W. Hammond, for the defendant.

Foster, J. The cloth coverings of the billiard tables were originally the property of the defendant. The plaintiff has acquired no title to them by contract or in any other manner, unless by reason of their having been placed upon the tables of which he was the owner. It was agreed at the trial that the coverings could be, and were, removed without injury to the tables. They did not therefore become by accession the property of the plaintiff, and were not so annexed to and incorporated with the tables that the real owner lost the right to take them off and to continue to treat them as his own.

If the coverings had been owned by McKnight, who made the bargain under which the defendant put them on the tables, a different rule might have applied. But McKnight, by false representations, induced the defendant to cover the tables, and when this fraud was discovered the defendant had the right to rescind the agreement which he had been thereby induced to make with McKnight, and might lawfully take back his property. Under such circumstances, the plaintiff had no title to sustain an action of tort for the conversion of this property; and the exceptions are overruled.

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JAMES B. TAMPLIN *vs.* EDWIN WENTWORTH.

A right of action of an insolvent debtor, on the Gen. Sts. c. 53, § 5, whether absolute or contingent, to recover threefold the amount of usurious interest paid by him, passes by an assignment of his estate in insolvency.

CONTRACT, on the Gen. Sts. *c.* 53, § 5, to recover threefold the amount of certain usurious interest. At the trial in the superior court, before *Ames*, C. J., without a jury, these facts appeared:

The plaintiff, wishing to borrow money, applied to Royal Richardson, who introduced him to the defendant. By an arrangement between the three, the plaintiff made and delivered to Richardson his promissory note for $1650, with a mortgage of real estate as security. Richardson indorsed the note and assigned the mortgage to the defendant; and he, in the plaintiff's presence, paid $1350 to Richardson, who, after deducting from the sum a commission for his services, delivered the balance to the plaintiff, who received no other consideration for his note. The judge found that this was not a mere purchase of a note and mortgage by the defendant, but a usurious transaction.

The plaintiff afterwards conveyed his right in equity to redeem the mortgaged premises, and divested himself of all title thereto. Several months after the note became due and payable, proceedings in insolvency were instituted against him on his own petition, and regularly prosecuted; but no claim against the defendant was included in the schedule of the plaintiff's property or disclosed to his assignee. More than two years after this, under a power of sale in the mortgage, the defendant duly sold the mortgaged premises for a sum sufficient to pay the full amount of the plaintiff's note and arrears of interest and incidental expenses. And less than two years after the sale the plaintiff brought this action.

On these facts the judge ruled that the plaintiff could not maintain the action, and found for the defendant; and the plaintiff alleged exceptions.

S. Snow, for the plaintiff.

R. F. Fuller, for the defendant.

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FOSTER, J. The usurious contract having been made before the insolvency of the plaintiff, all his right of action to recover the statute penalty passed by the assignment and became a part of his estate in insolvency. *Gray* v. *Bennett*, 3 Met. 522. *Cutler* v. *Bubier*, 4 Gray, 588. Whether this was a present right of action which could be immediately enforced, or a *locus penitentiæ* still remained until the usurious lender had received more than the sum lent with lawful interest, can in the opinion of the court make no difference. In either case, the right to the penalty, whether absolute or contingent, was a right of property which vested in the assignee, and could be enforced or released by him alone. The plaintiff, therefore, cannot maintain this action, and his

Exceptions are overruled.

LUCIUS B. MARSH & others *vs.* RODERICK MCKENZIE.

The courts of insolvency, being courts of record, have authority to amend errors in their records.

If the record of a court of insolvency shows that a decree was entered in due form for the issue of a certificate of discharge to an insolvent debtor, the judge cannot pass an order annulling such discharge, without notice to the parties interested, if the decree was actually made and truly recorded, or without formal amendment of such record, if it is erroneous.

CONTRACT for the price of dry goods sold to the defendant. Writ dated August 31, 1864. Answer, a general denial. An additional answer set up the institution of proceedings in insolvency against the defendant in the court of insolvency for Middlesex, since the entry of the writ, and a certificate of his discharge in insolvency by said court; and the plaintiffs filed a replication denying the validity of the discharge, and alleging that the certificate was obtained through accident and mistake of the register of insolvency.

Trial in the superior court, before *Reed*, J., who allowed a bill of exceptions, the material parts of which were as follows:

"The plaintiffs introduced an auditor's report, the findings

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whereof were in their favor, and then rested their case. The defendant, in his opening, stated that he should rely upon the discharge in insolvency set up in the additional answer. He put in no evidence upon the subject matter of the declaration, but offered a discharge, which makes a part of the case, and the record of the court of insolvency in the defendant's case, together with the papers in said case upon the files of said insolvent court, which record and papers may be referred to by either counsel. The plaintiffs, in reply, put in from said papers the paper marked A, which is a part of the case, and called one Sanford as a witness, who testified that he was counsel for the plaintiffs upon their claim against the defendant, in the court of insolvency, and who was permitted to testify, against the defendant's objection, that he made an oral application to that court for an examination of the defendant.

"The judge ruled that said paper A operated as an amendment of the record of the court of insolvency; that that court had a right to make such an amendment without notice to the parties; and that the discharge was rendered thereby invalid and inoperative. Neither party desired to address the jury; whereupon, on this ruling, a verdict was taken for the plaintiffs; and the defendant alleged exceptions."

By the copies annexed to the bill of exceptions it appeared that the record of the court of insolvency in the case of the defendant included an order for his discharge, signed by the judge of insolvency, under date of August 14, 1867, reciting that "at the third meeting of the creditors of said insolvent debtor, held by adjournment at this time, the court find" that he "has in all things conformed himself to the direction and requirements of the law relating to insolvent debtors," and "thereupon it is ordered that a certificate of discharge be granted to said insolvent debtor as provided by law;" and it further appeared that the paper marked A, also signed by the judge, bore date of September 5, 1867, and recited that "whereas it was ordered by said court, at the adjourned third meeting in said case, held August 14, 1867, that said debtor be examined, and on the same day by mistake his discharge was made and delivered by

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the register, he not knowing that such examination was ordered, it is therefore decreed that said discharge is null and void, and said debtor is hereby ordered to return the same, that it may be cancelled."

W. P. Harding, for the defendant.

W. S. Gardner, for the plaintiffs.

Hoar, J. The questions which arise upon the exceptions are these: first, Had the court of insolvency power to make the order contained in the paper marked A? and second, Is it such an amendment of the record as vacates the discharge in insolvency of the defendant, and makes it inoperative for his defence in the suit?

1. We are of opinion that the judge of insolvency had the power to amend the record of his court according to the truth, if the record at first made was erroneous. Such an authority is incident to a court of record; and the court of insolvency is a court of record. Gen. Sts. *c.* 118, § 1. *Balch* v. *Shaw*, 7 Cush. 282. *Fay* v. *Wenzell*, 8 Cush. 315. *Rugg* v. *Parker*, 7 Gray, 172. More exactly in point is the decision in *Batty* v. *Fitch*, 11 Gray, 184.

2. But the difficulty remains, that, on inspecting the full record of the insolvent court, it does not appear that the paper marked A would constitute such an amendment of the record as would be necessary to invalidate the discharge, and such as we presume was intended by the court. It is suggested by counsel, and is probably true, that the whole of the record, which is referred to and made a part of the bill of exceptions, was not brought to the attention of the learned judge before whom the cause was tried in the superior court. The paper A recites that, an examination of the debtor having been ordered, the certificate of discharge was made and delivered to the defendant by the register, by mistake, and in ignorance of the order; and decrees that the discharge is null and void, and directs the debtor to return it to be cancelled. The discharge was signed by the judge; but it is said that this arose from the fact that the register filled up without authority a blank which the judge had signed to be used when it should be required. We

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cannot regard the practice of leaving such blanks in the possession of the register, signed by the judge, as a safe or proper practice; but, on the contrary, it seems likely to lead to error and irregularities. But if this order would have been sufficient to correct the mistake of the register, if that had been the only one, the record further shows a regular and complete order and decree of the court that the discharge should be granted. The discharge is therefore shown to have issued in pursuance of a decree duly entered; and no amendment has been made of the record by striking out that decree; which should have been made, if that entry were incorrect and no such decree was really made by the court. But if the court made that decree, as the record, while unamended, conclusively shows to have been the fact, it is not competent for the court to pass an order annulling the discharge. In other words, though an erroneous record may be amended, a decree actually made and truly recorded cannot afterward be revoked, nor can the proper proceedings which have resulted from it be declared void and cancelled, at the pleasure of the judge, at a subsequent time, and without notice. *Pettee* v. *Wilmarth*, 5 Allen, 144. *Hall* v. *Marsh*, 11 Allen, 563.

The exceptions must be sustained; and, if the decree that a discharge should be granted was filled up by the register erroneously and without authority, upon a blank signed by the judge, and entered upon the record by mistake, the plaintiff must have the record properly and fully amended, before he can avoid its effect upon his rights. *Exceptions sustained.*

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Samuel Flint *vs.* James Pierce.

One who, to become a member of a corporation, signs a by-law which pledges members to be liable "in their individual as well as their collective capacity" for all moneys lent to it, is not thereby personally liable to the lender, for money subsequently lent to the corporation, without other evidence that it was lent on the credit of the by-law than that the preamble thereof sets forth that the design of the corporation is to afford to persons desirous of saving their money the means of employing it to advantage.

Contract against a stockholder of the Reading Agricultural and Mechanic Association for the amount of a balance due on a promissory note of the association made by its treasurer. The declaration alleged the individual liability of the defendant on the note by reason of his subscription of the following by-law of the association: "Article 10. The members of this association pledge themselves in their individual as well as their collective capacity to be responsible for all moneys loaned to this association and for the payment of which the treasurer may have given his obligation agreeably to the direction of the defendants."

At the trial, before *Gray*, J., without a jury, these facts appeared: The association was incorporated by the St. of 1830, *c.* 41, "for the purpose of encouraging agriculture and the mechanic arts by granting premiums or loans of money, and for relieving the distresses of unfortunate mechanics and their families, and to have all the privileges usually given by acts of incorporation to charitable societies;" and was organized March 30, 1831, when it adopted by-laws, one of which was that above quoted, and another provided that "any person may become a member of this association by subscribing his name to these by-laws and paying to the treasurer the amount of one or more shares." The preamble of the by-laws was as follows: "The design of this institution is to afford to those who are desirous of saving their money the means of employing it to advantage; it is intended to encourage the industrious and prudent, and to induce those who have not hitherto been so to lessen their unnecessary expenses, and to save and lay by something for a period of life when they will be less able to earn a support."

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The association never granted premiums for encouraging agriculture and the mechanic arts, nor ever made gifts for relieving the distresses of unfortunate mechanics and their families; but its sole business was the borrowing of money and discounting of notes therewith. From 1847 to 1860 it paid annual dividends of five dollars per share; and from and after 1852 its capital stock consisted of fifty shares of one hundred dollars each. The defendant subscribed his name to the by-laws, and became a shareholder and member of the association, prior to 1847. In 1859 the plaintiff lent to the association twenty-six hundred dollars, and held its notes therefor at five per cent. interest. Prior to August 29, 1862, the directors instructed the treasurer to "pay all outstanding notes which were at five per cent. interest, unless the creditors would renew them at four per cent. interest, and to renew all such as would renew at four per cent.;" and the treasurer gave notice of this direction to the plaintiff, who on that day surrendered the notes he held at five per cent., and took instead the following note for the balance due him: "Reading, August 29, 1862. The Reading Agricultural and Mechanic Association for value received promise to pay Samuel Flint or order twenty-six hundred and ninety-nine dollars in twenty days after demand, with interest at four per cent. if not paid within one year from date. Jonathan Frost, Treasurer." Upon this note the association made one payment of ninety-nine dollars in October 1862, and another of six hundred dollars and one year's interest in January 1864, and then, notwithstanding repeated demands by the plaintiff, failed ever to pay the balance. More than twenty days after the last such demand the plaintiff gave the defendant notice of the failure of the association to pay the note, and demanded payment thereof from him as a member of the association, and upon his refusal brought this action.

The judge reserved the case for determination by the full court; judgment to be entered for the plaintiff if it should be warranted by the facts, otherwise for the defendant.

D. S. Richardson, for the plaintiff. The promise of individual liability which the defendant subscribed was good as a contract, if not as a by-law. Angell & Ames on Corporations,

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§ 342. *Mussey* v. *Bulfinch Street Society*, 1 Cush. 148. The preamble shows that it was addressed to the public. The consideration was sufficient. It was a loan of money to the association, for the payment of which the treasurer gave his note agreeably to the direction of the directors, and was made in part for the defendant's benefit, who, as a stockholder, shared in the profits. *Davis* v. *Universalist Meeting-house Society*, 8 Met. 321. It was not needful that it should be direct to him as promisor. *Mellen* v. *Whipple*, 1 Gray, 321. *Dow* v. *Clark*, 7 Gray, 201. *Colt* v. *Root*, 17 Mass. 229. *Arnold* v. *Lyman*, Ib. 400. In *Trustees of Free Schools in Andover* v. *Flint*, 13 Met. 543, it was only by the defendant's omission to sign a similar by-law that he avoided liability thereon.

T. H. Sweetser & A. A. Prescott, for the defendant.

Wells, J. The note upon which this action is based is the contract of the corporation. The defendant is not a party to that contract; and the plaintiff does not seek, by this suit, to charge him upon any statute liability as a stockholder. Responsibility for the amount of the note is sought to be established through a by-law of the corporation, to which the defendant had attached his signature. This by-law, with others, was adopted in 1831. To become a member of the association it was requisite to subscribe the by-laws. It does not appear that the defendant's signature was attached for any other purpose than to constitute him a member of the corporation. It does not appear, and is not alleged, that the plaintiff lent his money upon the faith or credit of the individual pledge contained in the by-law; nor that the by-law was in any manner made known to him, or to the public, as the basis of such credit.

The office of a by-law is to regulate the conduct and define the duties of the members towards the corporation and between themselves. So far as its provisions are in the nature of contract, the parties thereto are the members of the association, as between themselves; or the corporation upon the one side, and its individual members upon the other. The right of any third party, stranger to the association, to establish a legal claim through such a by-law, must depend upon the general principles

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applicable to express contracts, as laid down in *Mellen* v. *Whipple*, 1 Gray, 317, and the subsequent decisions in *Field* v. *Crawford*, 6 Gray, 116, and *Dow* v. *Clark*, 7 Gray, 198. No action can be maintained by such third party unless he can bring his case within some of the recognized exceptions to that general rule. A pledge like the one in question, if made for the purpose of enabling the corporation to obtain a loan upon the faith of it, and used for that purpose, may perhaps give a right of action against the subscribers in favor of a party who has been induced to advance money upon its credit. This seems to be implied strongly by the decision in the case of *Trustees of Free Schools in Andover* v. *Flint*, 13 Met. 543, inasmuch as the plaintiff in that case appears to have failed to recover upon a similar claim merely for the reason that the defendant had not signed the by-law. But no such facts are shown to exist in the present case. The plaintiff not only is no party to the contract contained in the by-law, but he fails to show any privity between himself and the defendant in relation to the subject matter, or to the consideration, of his demand. Judgment must be rendered accordingly for the defendant.

ELBRIDGE HOWE *vs.* BENJAMIN S. HOWE.

Three sons took from their father a conveyance of all his estate, real and personal, consisting of a farm, farm-house, farming stock and household furniture, and promised, in consideration thereof, to pay his debts then existing and support him and his wife during their lives. One of them took from the others a power of attorney to hold and manage the property and fulfil their joint promise, and by virtue of this power paid his father's debts, supported his father and mother till they died, and carried on the farm, supposing that if it should yield a profit over these expenditures they should share it equally, but if otherwise, that they should equally share the loss. *Held*, that, if any partnership was created between them, it was, at most, in the profits and losses of carrying on the farm.

CONTRACT for one third of a balance due on an account for money paid by the plaintiff in settling, after March 29, 1864, debts contracted by Stephen Howe prior to that date; in supporting and taking care of said Stephen and his wife until the

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death of each respectively; for their funeral expenses; and in the care and management of a farm in Marlborough from March 29, 1864, to April 24, 1865, the date of the writ.

At the trial in the superior court, before *Putnam*, J., it appeared that on March 29, 1864, Stephen Howe conveyed to his three sons, (the plaintiff, the defendant, and Nahum B. Howe,) by deeds of warranty and a bill of sale in the usual form, all his estate, which consisted chiefly of a farm and farm buildings which he had occupied as a homestead, and of the farming stock and household furniture. As part of the consideration for the conveyance, the sons agreed to pay his debts then outstanding, and to support him and his wife during their lives; and they made a mortgage back to him of the real estate to secure performance of this agreement. The plaintiff took from his brothers a power of attorney to hold and manage the farm and other property so conveyed to them, and perform the agreement in their behalf; and he testified that by virtue of this power he carried on the farm, and paid part of his father's debts, and supported his father and mother till they died, and incurred the expenses charged in the account sued upon, making reasonable charges for his own services, and supposing "that if as the result of the management there should be a profit, it should be shared between the three equally, and if a loss, it should be borne by the three equally;" that his receipts had not been sufficient to meet the payments necessary; and that he had supplied the deficiency from his private funds, doing so for the purpose of executing the power of attorney and fulfilling the condition of the mortgage. And he further testified that his brothers examined his accounts in December 1864, and about the 1st of April 1865, and expressed their approval of them, and made no objection to any item.

It further appeared that shortly after this second examination the defendant orally revoked the plaintiff's authority as his attorney under said power, and conveyed to a third person all his title and interest in the property; and that at the date of this writ there were outstanding, unpaid, several debts of Stephen Howe which existed on March 29, 1864, and a physician's bill

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for attendance on said Stephen and his wife after March 29, 1864, and there were also on hand part of the farming utensils and all the furniture.

The defendant asked the judge to rule that he and his brothers were partners, and so that the plaintiff could not maintain the action; but he refused so to rule. A verdict was returned for the plaintiff; and the defendant alleged exceptions.

E. M. Bigelow, for the defendant.

W. B. Gale, for the plaintiff.

Gray, J. By the conveyances from Stephen Howe to his sons, they became the owners of the real and personal property conveyed, as tenants in common; and by their contemporaneous agreement with and mortgage to him, they became jointly liable to pay his outstanding debts and to support him and his wife for life. There is no evidence that they ever agreed or intended to make this property partnership property, or this obligation a partnership obligation. If any partnership was ever created between them, (upon which we express no opinion,) it was, at most, in the profits and losses of carrying on the farm. Partnership in profits and losses does not necessarily imply partnership in the property out of which the profits and losses arise. Story on Part. §§ 27, 29, 56. *French* v. *Styring*, 2 C. B. (N. S.) 357. A partnership between sons in the family homestead, furniture, and other property connected with it, conveyed to them by their father, or in a promise by them to him to pay his debts and support him and his wife, is too novel and extraordinary to be inferred without clear proof. It does not appear that any stock or other property purchased since the original conveyance remains on hand. The farm, the household furniture, and so much of the farming utensils conveyed by the father to the sons as still existed after the death of the parents, remained, as they had been from the time of the conveyance, the common, not the partnership, property of the sons. The few unpaid debts contracted by the father before the conveyance, as well as the physician's bill for subsequent attendance on him and his wife, were not incurred in carrying on the partnership business, and would have been as binding upon the sons, by virtue of their original

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agreement with their father, if no partnership had afterwards been entered into for carrying on the farm. There were therefore no partnership affairs or accounts remaining unsettled when this action was brought, and the only objection taken to its maintenance fails. *Exceptions overruled.*

FRANCIS A. CALVERT *vs.* WARREN ALDRICH.

In this Commonwealth, a tenant in common who makes necessary repairs upon the common property without the consent of his cotenant cannot maintain an action at law against him to recover contribution for the cost thereof.

CONTRACT. The defendant filed a declaration in set-off on an account annexed for two fifths of the cost of repairs of a machine shop in Lowell; and the only question in dispute in the case was the liability of the plaintiff for any portion of such cost.

At the trial in the superior court, before *Reed*, J., these facts appeared: Calvert and Aldrich owned the machine shop and the machinery therein in the proportion of two fifths and three fifths respectively, as tenants in common; and Aldrich, having agreed to pay to Calvert a yearly rent for such occupation of Calvert's two fifths, was in occupation thereof when the building caught fire, and the roof, windows and one of the floors were so burnt that the machinery was exposed to injury by the weather. Calvert at this time was in Europe, but had an agent in Lowell, to whom Aldrich immediately represented the importance of repairing the building. The agent confessed such importance, but replied that he had no authority from Calvert to sanction any repairs, and wrote to Calvert for instructions, who replied, declining to make any repairs upon the building. This letter the agent showed to Aldrich, who meanwhile had caused the building to be repaired. After the return of Calvert, Aldrich showed him the repairs and stated to him the expenses thereof, and asked him to contribute his proportion of the same.

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But Calvert, not disputing that the expenses were reasonable, contended that he was not liable for any portion of them, and refused to contribute.

On these facts the judge ruled that the defendant could not recover on his account in set-off, and ordered judgment for the plaintiff; and the defendant alleged exceptions.

A. R. Brown, for the defendant.

C. Cowley, for the plaintiff.

Foster, J. The issue in this action is on an account of one cotenant in common against another to recover from the defendant in set-off part of the cost of certain needful repairs made by the plaintiff in set-off upon the common property. It is not founded upon any contract between the parties, but upon a supposed legal obligation which, if its existence were established, the law would imply a promise to fulfil.

The doctrine of the common law on this subject is stated by Lord Coke as follows: "If two tenants in common or joint tenants be of an house or mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a writ *de reparatione faciendâ*, and the writ saith *ad reparationem et sustentationem ejusdem domûs teneantur*, whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men." Co. Lit. 200 *b*; Ib. 54 *b*. And in another place he says: "If there be two joint tenants of a wood or arable land, the one has no remedy against the other to make inclosure or reparations for safeguard of the wood or corn," but if there be two joint tenants of a house, the one shall have his writ *de reparatione faciendâ* against the other. This is said to be because of "the preëminence and privilege which the law gives to houses which are for men's habitation." *Bowles's case*, 11 Co. 82.

In *Carver* v. *Miller*, 4 Mass. 561, it was doubted by Chief Justice Parsons whether these maxims of the common law, as applied to mills, are in force here, especially since the provincial statute of 7 Anne, *c.* 1, revised by St. 1795, *c.* 74.

In *Loring* v. *Bacon*, 4 Mass. 575, the plaintiff was seised in

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fee of a room and the cellar under it, and the defendant of the chamber over head and of the remainder of the house; the roof was out of repair; the defendant, being seasonably requested, refused to join in repairing it; and thereupon the plaintiff made the necessary repairs, and brought assumpsit to recover from the defendant his proportion of their cost. This, it will be observed, was not a case of tenancy in common, but of distinct dwelling-houses, one over the other. Chief Justice Parsons said: "If there is a legal obligation to contribute to these repairs, the law will imply a promise. We have no statute nor any usage on the subject, and must apply to the common law to guide us." "Upon a very full research into the principles and maxims of the common law, we cannot find that any remedy is provided for the plaintiff." It was not absolutely decided that an action on the case would not lie, but the intimations of the court on the subject were such that no further attempt appears to have been made. The relations between tenants in common were not actually involved in this case, and the remarks touching the writ *de reparatione* were only incidental and by way of illustration.

Doane v. *Badger*, 12 Mass. 65, was an action on the case. The plaintiff had a right to use a well and pump on the defendant's land; and the defendant had removed the pump and built over the well, thereby depriving the plaintiff of the use of the water. The judge before whom the case was tried had instructed the jury that the defendant, by the terms of a deed under which he claimed, was bound to keep the well and pump in repair, although they were out of repair when he purchased, and, without any previous notice or request, was liable in damages for the injury the plaintiff had sustained by his neglect to make repairs. The court held that no such evidence was admissible under the declaration, the cause of action stated being a misfeasance, and the proof offered being of a nonfeasance only; also, that a notice and request were indispensable before any action could be maintained. Mr. Justice Jackson in delivering the opinion made some general observations, unnecessary to the decision of the cause, the correctness of which requires a par-

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ticular examination. He said that the action on the case seems to be a substitute for the old writ *de reparatione faciendâ* between tenants in common, and could not be brought until after a request and refusal to join in making the repairs. He added: "From the form of the writ in the register, it seems that the plaintiff, before bringing the action, had repaired the house, and was to recover the defendant's proportion of the expense of those repairs. The writ concludes, '*in ipsius dispendium non modicum et gravamen.*' It is clear that until he have made the repairs he cannot in any form of action recover anything more than for his loss as of rent, &c., while the house remains in decay. For if he should recover the sum necessary to make the repairs, there would be no certainty that he would apply the money to that purpose." *Mumford* v. *Brown*, 6 Cowen, 475, a *per curiam* opinion of the supreme court of New York, and *Coffin* v. *Heath*, 6 Met. 80, both contain *obiter dicta* to the same effect, apparently founded upon *Doane* v. *Badger*, without further research into the ancient law. If it were true that the writ *de reparatione* was brought by one cotenant, after he had made repairs, to recover of his cotenant a due proportion of the expense thereof, there would certainly be much reason for holding an action on the case to be a modern substitute for the obsolete writ *de reparatione*. But all the Latin forms of the writ in the Register, 153, show that it was brought before the repairs were made, to compel them to be made under the order of court. Indeed, this is implied in the very style by which the writ is entitled, *de reparatione faciendâ*, viz: of repairs to be made; the future participle *faciendâ* being incapable of any other meaning. This also appears in Fitzherbert, N. B. 127, where the writ between cotenants of a mill is translated; the words, *in ipsius dispendium non modicum et gravamen*, (quoted by Judge Jackson,) being correctly rendered, "to the great damage and grievance of him," the said plaintiff. Fitzherbert says: "The writ lieth in divers cases; one is, where there are three tenants in common or joint or *pro indiviso* of a mill or a house, &c., which falls to decay, and one will repair but the other will not repair the same; he shall have this writ against them."

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In the case of a ruinous house which endangers the plaintiff's adjoining house, and in that of a bridge over which the plaintiff has a passage, which the defendant ought to repair, but which he suffers to fall to decay, the words of the precept are, "Command A. that," &c., "he, together with B. and C., his partners, *cause to be repaired.*" The cases in the Year Books referred to in the margin of Fitzherbert confirm the construction which we regard as the only one of which the forms in that author are susceptible, namely, that the writ *de reparatione* was a process to compel repairs to be made under the order of court. There is nothing in them to indicate that an action for damages is maintainable by one tenant in common against another because the defendant will not join with the plaintiff in repairing the common property. In a note to the form in the case of a bridge, it is said in Fitzherbert: "In this writ the party recovers his damages, and it shall be awarded that the defendant repair, and that he be distrained to do it. So in this writ he shall have the view *contra*, if it be but an action on the case for not repairing, for there he shall recover but damages." There is no doubt that an action on the case is maintainable to recover damages in cases where the defendant is alone bound to make repairs for the benefit of the plaintiff without contribution on the part of the latter, and has neglected and refused to do so. See *Tenant* v. *Goldwin*, 6 Mod. 311; *S. C.* 2 Ld. Raym. 1089; 1 Salk. 21, 360.

The difficulty in the way of awarding damages in favor of one tenant in common against his cotenant for neglecting to repair is, that both parties are equally bound to make the repairs, and neither is more in default than the other for a failure to do so. Upon a review of all the authorities, we can find no instance in England or this country in which, between cotenants, an action at law of any kind has been sustained, either for contribution or damages, after one has made needful repairs in which the other refused to join. We are satisfied that the law was correctly stated in *Converse* v. *Ferre*, 11 Mass. 325, by Chief Justice Parker, who said: "At common law no action lies by one tenant in common, who has expended more than his

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share in repairing the common property, against the deficient tenants, and for this reason our legislature has provided a remedy applicable to mills." The writ *de reparatione faciendâ* brought before the court the question of the reasonableness of the repairs proposed, before the expenditures were incurred. It seems to have been seldom resorted to; perhaps because a division of the common estate would usually be obtained where the owners were unable to agree as to the necessity or expediency of repairs. Between tenants in common, partition is the natural and usually the adequate remedy in every case of controversy. This is the probable explanation of the few authorities in the books, and of the obscurity in which we have found the whole subject involved. But if we have fallen into any error in our examination of the original doctrines of the common law of England, it is at least safe to conclude that no action between tenants in common for neglecting or refusing to repair the common property, or to recover contribution for repairs made thereon by one without the consent of the other, has been adopted among the common law remedies in Massachusetts.

This result is in accordance with the rulings at the trial.

Exceptions overruled.

JOHN F. BALDWIN & another, executors, *vs.* ARTEMAS PARKER & others.

On the separate and distinct issue whether the execution of a will was procured by undue influence, the burden of proving undue influence is upon the party alleging it.

A will made in favor of the testator's second wife and her children was contested, upon the grounds of undue influence and of insanity, by the children of the first wife, who introduced evidence of the amount of his property at the time of the second marriage, and of harsh treatment of themselves by the second wife. She, being called as a witness, and asked to state in reply, as nearly as she could, the amount of the testator's property at the time of their marriage; and whether he was then much in debt; and, if so, to what amount; answered that she could not tell exactly, but did not think that, if his debts had been paid, his property would have amounted to a sum which she named, nor to half of it; that he was much in debt, but she could not tell how much. Being also asked how she treated her step-children, whether kindly or otherwise; and whether she

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failed in her duty to them as a mother; and, if so, in what respect; she answered that she treated them as kindly as if they had been her own children, and had nothing in her heart but to bring them up the best way, and did not think of any way in which she failed except in doing too much for them. No specific objection having been made to that portion of the second answer in which the witness stated what she had in her heart, *Held*, that no exception lay to the admission of these questions and answers.

A witness being asked, on cross-examination, whether at a certain date he had heard anything on a certain subject in a family of which he and his wife were members, the party proposing the question stated that he did not wish the witness, in answering, to name the conversation in which, nor the person from whom, he had so heard. The other party objected to the form of the question so far as it related to information derived by the witness from private conversations with his wife, unless he should be allowed to state the details of the conversation. The judge ruled that the witness could not testify to private conversations between himself and his wife, and that the question should be modified so as either to exclude information so derived, or not to confine the source of information to that family. *Held*, that there was no ground of exception to this ruling.

APPEAL by Artemas Parker, Stephen Taylor and his wife Emmeline, and the minor children of Frederick Parker, from a decree of the judge of probate, allowing as the last will of Jonas Parker, of Carlisle, who died June 2, 1866, an instrument executed May 17, 1866, which disposed of the bulk of the testator's estate to his second wife and her children.

At the hearing, before *Gray*, J., the formal execution and attestation of this instrument were proved; and a trial by jury was had upon two issues: 1. Whether the testator at the time of the execution was of sound and disposing mind. 2. Whether the execution was procured by the undue influence of Anna Parker, John Gleason, Joanna Gleason and John F. Baldwin, or some of them. It appeared in evidence that Jonas Parker was twice married, the first time in 1809 and the second in 1818; that the appellants Artemas and Emmeline, together with Frederick and Jonas, who died before him, were his children by his first wife, who died in 1817; and that Joanna, wife of John Gleason, and Fanny, wife of John F. Baldwin, were his children by his second wife, Anna Parker, who survived him.

The appellants contended that the burden of proof was upon the executors on both issues; the judge ruled that the burden of proving the sanity of the testator was upon the executors, but the burden of proving undue influence was upon the appellants; and to this ruling the appellants alleged exceptions.

The appellants were allowed, against the objection of the ap-

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pellees, to introduce evidence to show that the second wife, from the time of her marriage, treated the children of the first wife harshly, and overworked them to the injury of their health, and influenced and controlled her husband in the management of his affairs. Evidence was also introduced by them, without objection, as to the amount of the testator's property at the times of his second marriage and of his last sickness. The appellees were afterwards allowed, against the objection of the appellants, to give in evidence the following interrogatories and answers in the deposition of the second wife, although these interrogatories had been objected to by the appellants before answer at the taking of the deposition.

Int. "About what amount of property had Mr. Parker at the time of your marriage? State as nearly as you can. Was Mr. Parker much in debt at the time of your marriage? If so, state about how much he owed?" *Ans.* "I could not tell exactly. I don't think it would amount to five hundred dollars, or half of it. If his debts were paid, I don't think it would. He was much in debt. I could not tell how much, so many debts came in."

Int. "How did you treat Emmeline, Frederick and Artemas, whether kindly or otherwise? State if you failed in your duty to them as a mother in any respect. State wherein and in what manner." *Ans.* "I treated them as kindly as if they had been my own children, and had nothing else in my heart but to bring them up the best way they could be. I don't think of any way in which I failed, except it was in doing too much for them."

To the admission of this portion of the deposition the appellants alleged exceptions.

It appeared in evidence that the testator's family at the time of his last sickness consisted of his wife, John Gleason, and Mrs. Gleason; that John Gleason went to New Hampshire on May 11; returned on May 13; and on May 14 went with John F. Baldwin to Chelmsford with an order written in the testator's name by Mrs. Gleason, to obtain a former will of the testator from a person with whom he had deposited it; but it was in controversy whether or not they went for the will, or she wrote

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the order, by direction of the testator. Upon cross-examination of John Gleason, the appellants proposed to ask him, "Had you heard, before you went up country on the 11th of May anything in the family upon the subject of the testator's having made a former will, or upon the subject of his making a new will?" And they said at the same time that they did not wish the witness to state the conversation in which, nor the name of the person from whom, he received the information. The appellees objected to this question, so far as it related to information derived by the witness from private conversations with his wife, unless he should be allowed also to state the details of the conversation. The judge ruled that the witness could not testify to private conversations between himself and his wife; and that either the question should be so modified as to exclude information received in such conversations, or else so as to ask the witness whether he had heard anything, before the time specified, upon the subject, without confining it to what he had heard in the family. The appellants declined to modify the question; and excepted to its exclusion in the form in which they had put it.

The jury returned a verdict for the appellees upon both issues; and the judge reported the case for the determination of the full court, such order and decree to be made therein as law and justice might require.

D. S. Richardson & T. H. Sweetser, for the appellants.

B. F. Butler & W. P. Webster, for the appellees.

Hoar, J. We do not find any valid objection to the admission or rejection of evidence at the trial, which would furnish a reason for setting aside the verdict.

The questions to Mrs. Parker in relation to the amount of her husband's property, and his debts, did not ask for opinions, but facts; of which she had means of knowledge. Her answer was a statement of facts, not made with precision and accuracy, and undoubtedly to some extent a matter of estimate; but still it was testimony upon facts. There was no suggestion that his property was of such a kind that she would not know its value. Questions as to quantity, distance or size, where there has been

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no measurement, always involve an estimate, and to that extent an opinion; but there is no legal objection to asking a witness who is acquainted with the position of two objects, how far one is from the other, or to his answering that it is about half a mile, because he has never measured the distance.

So the question as to her treatment of the children, though general in its form, and calling for an answer equally general, was unobjectionable. Either party could have inquired for the particulars more fully, if they had chosen to do so. Whether she treated the children well and kindly was a fact within her knowledge, and no more a matter of opinion than most of the common facts in human experience. It is not easy to see how the fact could have been proved otherwise, without a detailed narrative of everything she had ever said or done to them, in the whole course of their lives, in order that the jury might judge of the kindness of each act and word. This would be absurd. The substance of her testimony was only to deny, in a general form, any acts of unkindness. The part of her answer which stated that she "had nothing else in her heart but to bring them up in the best way" perhaps should have been excluded, if a specific objection had been made to it, because she was to testify to acts and not to thoughts and purposes. But we do not see that it materially added to the evidence which was competent, and no distinction was made in the general objection to her whole answer.

The exception to the ruling upon the form of question to be put to John Gleason on cross-examination does not seem to be substantial. If the purpose of the question was merely to show that Gleason was acquainted with a certain fact at a particular time, in order to explain his conduct, or to affect the inferences to be drawn from it, then it was sufficient to show that he had been informed of the fact, and was not material to inquire whether the information came from one person or another. But if the purpose was to prove something relating to the person who gave the information, it would be open to the other party to inquire just what was said. If the information was given by his wife, and in a private conversation which the statute pro-

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hibits to be used in evidence, either the fact that she gave him the specific information must be excluded on that ground; or if that objection to her testimony were waived or overruled, (which we do not intend to imply would be allowed,) the particulars of the conversation would be open to examination, as in the case of any other witness. In either view, therefore, there is no ground of exception to the limitation upon the question imposed by the court.

The other question reserved upon the report is of more difficulty and importance. It is the question, Upon whom is the burden of proof upon the issue of undue influence? The claim on the part of the appellants is, that the party propounding the will is bound to prove that it is the will of the testator, and not of some other person operating upon and through him. On the other hand, the executors contend that when the execution of the instrument and testamentary capacity are established, nothing more is required by law to be shown affirmatively; and that, to avoid an instrument for fraud or duress, they must be proved by him who alleges them. In support of the former view it is argued that the issue upon the probate of a will is substantially a single one, to prove that the instrument was freely executed, according to the forms required by law, by a testator of sound mind; and that, whatever presumptions may exist upon any part of this issue, the burden of proof does not shift.

The question is certainly not without difficulty, and the authorities upon it are very conflicting. It is settled in this Commonwealth that on the issue of sanity or testamentary capacity the burden of proof is upon the party that offers the will for probate; and that the presumption of sanity does not shift the burden upon the opposing party. *Crowninshield* v. *Crowninshield*, 2 Gray, 524. *Baxter* v. *Abbott*, 7 Gray, 72. The burden is undoubtedly on the same side to prove the formal execution of the instrument, and that the testator executed it as and for his last will.

The objection to a will that it was obtained by undue influence is not one which it is easy to define with precision. The

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term seems to include both fraud and coercion. Sir John Nicholl defines it to be that degree of influence which takes away from the testator his free agency; such as he is too weak to resist; such as will render the act no longer that of a capable testator. *Kinleside* v. *Harrison*, 2 Phillim. 551. Where influence has been exerted upon a person of feeble mind, or whose faculties are impaired by age or disease, it is not always easy to draw the line between the issues of sanity and of undue influence. So it is possible that in many cases the coercion might be such as to be available to set aside the will on the ground that it had not been executed by the testator.

But where the issue of undue influence is a separate and distinct issue, involving proof that the testator, though of sound mind, and intending that the instrument, which he executes with all the legal formalities, shall take effect as his will, was induced to execute it by the controlling power of another, we think the weight of authority and the best reason are in favor of imposing upon the party who alleges the undue influence the burden of proving it. And we are inclined to think that this has been the general practice in this Commonwealth. *Glover* v. *Hayden*, 4 Cush. 580.

The most recent decision in the court of appeals in the state of New York upon the question is to the same effect. *Tyler* v. *Gardiner*, 35 N. Y. 559. All the judges concurred upon this point, though they differed upon others arising in the case.

The decision in *Crowninshield* v. *Crowninshield*, and in *Baxter* v. *Abbott*, *ubi supra*, that the burden of proof is upon the party propounding the will to establish the sanity of the testator, although the presumption of law is in favor of sanity, is placed very much upon the construction of the statute of wills, which makes the sanity of the testator a condition precedent to his power to make a will. But when all is proved that the statute requires; when a testator of sound mind has intentionally made and published a will according to the forms of law, his will is as much a legal conveyance and disposition of his property as any other lawful instrument of conveyance. It may be impeached or made invalid by proof of fraud, duress,

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or undue influence, which have caused it to contain provisions which he has been wrongfully induced to insert in it; but so may a deed or other contract be impeached for the like reason.

The defence of duress or fraud, when made in avoidance of a deed, is required to be specially pleaded, and is not good under the issue of *non est factum*. The reason seems to be, that the instrument is voidable, and not void; it is the deed of the maker of it; and, if he would avoid it, he is called upon to prove the existence of facts which will authorize him to do so. Yet the issue of fraud or duress involves the question whether the deed was ever obligatory, as much as the same issue does the original validity of a will. It is true that the distinction between a voidable and void act has no precise application to a will; because a will is in its nature revocable, and may be set aside by a testator at his pleasure. But the question whether a will is his free act, the product of his own volition and not of another's, is essentially the same as in the case of a contract; and there is no positive statute rule to make a difference in this respect.

It was said by Baron Parke in *Barry* v. *Butlin*, 1 Curteis, 638, and the observation was quoted with approbation by Mr. Justice Thomas in *Crowninshield* v. *Crowninshield*, "that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator." This statement, though apparently supporting the doctrine that the burden of proof on the issue of undue influence is on the party propounding the will, we do not feel sure was so intended.

The case was tried upon an allegation by the executors propounding the will, and upon allegations of the heir setting up that it was obtained by undue influence. The question discussed by Baron Parke upon the burden of proof was upon the point, whether, if it appeared that the will was prepared by a person who took a benefit under it, it made a presumption and *onus probandi* against the will, and required proof that the contents of the will were known to the testator.

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He says: "If it is intended to be stated, as a rule of law, that in every case in which the party preparing the will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure, but a particular species of proof is therefore required from the party propounding the will, we feel bound to say that we conceive the doctrine to be incorrect. The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burden is cast the issue must be found against him." "In all cases this *onus* is imposed on the party propounding a will; it is in general discharged by proof of capacity and fact of execution; from which the knowledge of and assent to the contents of the instrument are assumed, and it cannot be that the simple fact of the party who prepared the will being himself a legatee is in every case and under all circumstances to create a contrary presumption, and to call on the court to pronounce against the will unless additional evidence is produced to prove the knowledge of its contents by the deceased."

He concludes that it amounts only to a circumstance of suspicion, calling for care in the court, and calling on it not to grant probate without entire satisfaction that the instrument does express the real intentions of the deceased.

The whole result of the reasoning would seem to be, that upon the separate issue of undue influence the burden of proof is upon the party alleging it; and that it does not shift upon the party having the general burden of establishing the will, upon the mere introduction of evidence of a single circumstance of suspicion. If no evidence were offered on either side, the allegation of undue influence would fail. In the language of Chief Justice Mellen, "the law requires proof of facts; especially when the object is to destroy and set aside an act apparently deliberate, and executed with all usual and legal formalities." *Small* v. *Small*, 4 Greenl. 224. The view which we have taken of the English doctrine on the subject is confirmed by a recent decision in the house of lords, *Boyse* v. *Rossborough*, 6 H. L. Cas. 2. In that case, p. 49, Lord Cranworth says: "One point, however, is beyond dispute, and that is, that where

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once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed."

The rule which was adopted at the trial seems therefore to us to be correct in principle, and supported by authority, as well as obviously the most convenient in practice; and none of the objections to the probate of the will can be supported.

Judgment on the verdict.

Alfred L. Howe *vs.* Elbridge Howe & others.

To impeach the validity of a deed, evidence of declarations of the grantor, while of sound mind, prior to the execution of it, as to his intentions concerning the disposal of the granted premises, is admissible, when offered "among other circumstances tending to prove unsoundness of mind, undue influence and fraud;" especially if it is a deed of gift disposing of the grantor's estate among his children and omitting any provision for the issue of a deceased child.

Under the Gen. Sts. c. 131, § 14, on trial of the validity of a deed to a married woman, her husband is a competent witness in her behalf, notwithstanding the death of the grantor.

Execution of a deed in presence of an attesting witness is some evidence from which to infer a delivery thereof.

On the issue whether a deed is invalid by reason of the execution thereof while the grantor was of unsound mind or under undue influence, evidence that several months afterwards he remembered executing it, understood what he had done thereby, gave his reasons therefor, and expressed no regret or dissent, is admissible as tending to show sanity and ratification.

On the issue whether the execution of a deed was procured while the grantor was of unsound mind or under undue influence, the burden of proving insanity or undue influence is upon the party alleging it.

Influence properly gained, although used for a selfish purpose and to obtain an unjust advantage, will not avoid a deed thereby procured, unless there is fraud or duress, or unless it is so exerted as to substitute the will of him exerting it for that of the grantor to such a degree that the latter is no longer a free agent.

The refusal of the judge presiding at a trial to make a ruling upon a part only of the evidence, and which assumes that facts are fully established which such part has only a tendency to prove, is no ground of exception.

Petition for partition of a farm comprising seventy five acres of land in Marlborough, of one fifth part whereof the petitioner

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claimed to be seised in fee simple as tenant in common with the respondents.

At the trial, before *Chapman*, J., it appeared that Stephen Howe, who died March 20, 1865, had four sons and a daughter, viz: Alfred, who was a soldier in the army of the United States, had been missing ever since the second battle of Manassas on August 30, 1862, and left the petitioner as his only child, then less than two years old; and Elbridge, Nahum B., Benjamin S., and Mary L., wife of Abraham Holman, who were the respondents, and all of whom, except Benjamin, contested the plaintiff's claim, and contended that Stephen Howe had divested himself of all title to the land by deeds dated respectively September 1, 1863, and March 29, 1864, in the first of which he granted part of the land to Mary, and in the others all the residue of his real estate to Elbridge, Nahum and Benjamin.

The petitioner contended that these deeds were procured by fraud and undue influence, and that Stephen Howe's mind was not sound when he made them; introduced evidence that, in May and June 1863, said Stephen, being then eighty-three years old, and seised of the land, was sick with a fever; and argued that he was unsound in mind and incapable of transacting business from that time to the time of his death.

In the language of the report of the presiding justice, "among other circumstances tending to prove unsoundness of mind, undue influence and fraud, the petitioner offered evidence of the previous declarations of said Stephen, made before said sickness, that the petitioner was going to have Alfred's share if Alfred did not return; but the court excluded evidence of such declarations made prior to the sickness when it was admitted that his mind was sound."

The judge, against the petitioner's objection, admitted Abraham Holman, the husband of the respondent Mary, to testify as a witness in the respondents' behalf.

The jury found a verdict for the respondents, and the judge reported the case for revision by the full court.

E. M. Bigelow, for the petitioner.

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T. H. Sweetser, (*W. B. Gale* with him,) for the respondents.

WELLS, J. The declarations of Stephen Howe, that the petitioner would have his father's share of said Stephen's property, made before the sickness which was claimed to have resulted in unsoundness of mind, would not of themselves tend to prove that his subsequent deeds were procured by undue influence and fraud; nor that he was insane at the time of making such deeds; and, if offered alone, would clearly be inadmissible. The question in this case is, whether they are admissible if offered "among other circumstances tending to prove" such facts.

The objection to the deeds rests upon the proposition that they are not the acts of a free will and sound mind. Upon such issues, the character and effect of the instruments themselves, and the nature of the transaction, would have an important bearing. If it was in the nature of a final settlement of the estate of Stephen Howe, dividing it among his children, and entirely excluding the son of a deceased child from all participation, that circumstance would be competent for consideration. It would be stronger or weaker according to the relations that existed between them. Such evidence is constantly resorted to in cases upon wills; and the proof is the same in kind, whether the issues relate to wills or deeds. The proposition that the instrument expresses a purpose different from the real purpose of the party when in sound mind involves an inquiry into what that real purpose was. The presumption, based upon natural impulses, that a man would not disappoint the just expectations of one who has claims of blood, affection, or dependence upon him, without some strong motive or influence operating on his mind or will, may properly be urged against an instrument which disregards such claims. It may be met by explanations, showing what the real purpose or motive was; or by proof that the instrument actually accords with the declared purposes of the party. So also it may undoubtedly be strengthened by proof that it is contrary to the purposes previously declared by him. The competency of such declarations stands upon the same footing with the presumptions which render the unnatural provisions of the instrument itself proper for consideration in determining such issues.

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A foundation must undoubtedly be laid before such declarations can properly be admitted to impeach a deed. But, when the foundation has been laid by evidence tending to show unsoundness of mind, or undue influence and fraud, especially if the deed be one of gift conveying all the property of the grantor, evidence of a previously declared purpose of the grantor, contrary to the disposition thus made, is admissible, in connection with such other evidence, to show that the deed is the result of insanity or imposition, and not the free act and deed of the grantor. In the issue of undue influence and fraud there are two distinct questions: first, Was the improper influence exerted? second, Did it produce its intended effect? Upon the latter question, if there is other evidence to sustain the former, such declarations are certainly admissible and competent.

In this case, the deeds conveyed all the grantor's property to his four children. The petitioner, who is the child of a deceased son, is thus deprived of all share of the estate. The deeds were executed after the grantor, at the age of eighty-three, had been sick with a fever for several weeks, by which the petitioner claimed that his mind had been unsettled. A majority of the court are of opinion that the further statement in the report, that the declarations in question were offered "among other circumstances tending to prove unsoundness of mind, undue influence and fraud," requires the interpretation that such other evidence fairly raised the question whether the deeds did express the free and conscious purpose of the grantor's mind, or the contrary; and that the evidence was rejected as incompetent in its nature, and not admissible in any aspect of the case. It does not appear that the declarations were rejected because a sufficient foundation had not been laid in other respects. We are forced to this construction of the report, because we can see no limit that we are authorized to put upon the extent of the "other circumstances tending to prove," &c.

The husband of one of the respondents was properly admitted to testify. The Gen. Sts. *c.* 131, § 14, expressly remove all objection on the ground of his being husband of one of the parties; and the proviso, where one of the original parties to the

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contract or cause of action is dead, excludes only "the other party."

Upon the first point, however, the objection of the petitioner is sustained and the *Verdict set aside.*

A new trial was had at April term 1868, before *Wells*, J., who made a report thereof substantially as follows:

The petitioner proved Stephen Howe's seisin of the land described in the petition; the death of said Stephen on March 20, 1865; his own descent through Stephen's deceased son Alfred; and the survivorship of the three other sons and the daughter of said Stephen; as at the former trial. And it appeared that the wife of said Stephen died on July 14, 1864.

Nahum B. Howe and Elbridge Howe appeared and denied the petitioner's right, and produced in evidence a warranty deed from Stephen Howe to Mrs. Holman, dated and acknowledged September 1, 1863, and recorded September 26, 1863, conveying to her part of the land, minutely described by courses and distances, stakes, and other boundaries; and attested by Stephen Morse, a justice of the peace, who testified that he wrote, witnessed and took the acknowledgment of the deed; that Abraham Holman, the husband of the grantee, came to his house with the grantor, was present while the deed was written and executed, and went away with the grantor; that one of them gave him a memorandum of the courses and distances, from which he wrote the deed; and that the grantor had come alone to see him in relation to making the deed, on a previous day. The consideration named in the deed was love, affection and services rendered. There was no release of dower or homestead, nor any signature of the grantor's wife. The respondents also produced two warranty deeds from Stephen Howe to his three sons, Nahum, Elbridge and Benjamin, dated March 29, acknowledged April 1, and recorded April 28, 1864; one conveying to them the remainder of the land included in the petition; the other conveying to them all the residue of the grantor's real estate, including a lot of land called the Berlin woodlot. To these deeds also there was no signature of the grantor's wife.

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They further produced a mortgage of the premises described in these deeds, from the grantees therein named to said Stephen, also dated March 29 and acknowledged April 1, but not recorded, purporting to convey to him the premises, with a covenant by them to pay his debts not exceeding $1,000, and to support him and his wife during their lives, and upon condition as follows: "At the death of S. Howe and his present wife, this deed shall be absolutely void. If default shall be made by said grantors, then this deed shall remain in full force and virtue." They also introduced in evidence a bill of sale from said Stephen to said grantees of all his personal property, also dated March 29. And they called as a witness Edward L. Bigelow, a justice of the peace, who testified that on April 1 he took said Stephen's acknowledgment of said two deeds, and wrote his name as witness thereto, in the sitting-room of Elbridge Howe's house, where the grantor then was, in the presence of Elbridge and his family; that in reply to a formal interrogatory whether they were signed by him and were his free acts and deeds, the grantor either nodded, or signified his assent by a word; that at the same time, at Elbridge's request, the witness signed his name as a witness to the bill of sale; that Elbridge came to his place of business with a carriage, and conveyed him to the house and brought him back; that he was in the house only just long enough to do the formal work; that nothing else was said or done; and that he left all the papers on a table in the room where said Stephen and Elbridge had been together.

The petitioner contended that at the time of the execution of the three deeds introduced by the respondents, Stephen Howe was of unsound mind; and also that they were obtained by undue influence and fraud.

Upon the issues of undue influence and fraud there was evidence tending to prove that the two deeds to the three sons, and the bill of sale of personal property, and the alleged mortgage, were written at Elbridge's dictation, by an attorney employed by him, who witnessed, and took his acknowledgment of, the mortgage, but who never saw or communicated with Stephen Howe; that in May and June, 1863, Stephen Howe was sick

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with a fever, during which Mrs. Holman attended on and took care of him; that ever afterwards his body and mind were enfeebled; that after the sickness Mr. Holman had charge of his affairs till Elbridge took charge of them under a power of attorney dated February 24, 1864; that Earl Joslin surveyed the land described in the deed to Mrs. Holman about the time of the date thereof, Mr. Holman at the grantor's request helping to carry the chain, the grantor being at the time in the house; that Joslin made a memorandum of the courses and distances, and gave it to Holman's daughter; that those courses and distances ran so as to greatly injure the rest of the farm; and that on several occasions, and to several persons, the grantor, before his sickness, and down to the time when Elbridge took charge of his affairs, expressed his intention that the petitioner should be remembered in the disposition of his estate, and should have the Berlin woodlot, saying it would be an appropriate gift for the boy. It was also testified by Earl Joslin that during the spring in which Elbridge took charge of the grantor's affairs the grantor told him that it was his intention to give the boy the Berlin woodlot, and told Elbridge so, and Elbridge approved of it; that he and Elbridge went to look at it, and then Elbridge thought it was not best to give it to the boy, but that it should go with the farm. There was evidence that the grantor had great confidence in Elbridge.

The respondents also introduced evidence tending to show that several months after the deeds to the three sons the grantor spoke of them and of his having given them, that he remembered the transaction and understood what he had done, gave reasons therefor, and did not express any regret or dissent. At the respondents' request, the judge instructed the jury that this was competent evidence, tending to show that he understood his act at the time, and also that he ratified it.

John C. Draper, one of the witnesses called by the respondents, testified on cross-examination that the grantor said that they teased him, and especially that Mr. Holman teased him constantly. At the respondents' request, the judge instructed the jury that a deed could not be avoided upon the ground that

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the grantor had been annoyed, by teasing, into making it, if he was of sound mind and able to exercise his own free will notwithstanding such influence.

The judge also instructed the jury, at the request of the respondents, that the burden of proving unsoundness of mind of the grantor at the time of the execution of the three deeds was upon the petitioner, and that it was incumbent on him to prove it by a fair preponderance of the evidence.

The petitioner requested the court to give to the jury the following instructions:

"1. That though the influence may have been that of affection only, and may have been gained by kind offices of duty or affection, or attention to the grantor's bodily infirmities, still if that influence so acquired was abused for a selfish and unjust purpose, or to obtaining an unjust and unfair advantage over others equally entitled to his bounty, such influence was undue influence.

"2. That the circumstances attending the execution of the Holman deed — the facts that Holman at the time had charge of the grantor's affairs; that he helped to carry the chain; that he accompanied the grantor to Stephen Morse's house, and remained present while the deed was written and executed, and accompanied him back; that the memorandum of the courses and distances was given to his daughter: and that the grantor's wife did not sign the deed — raise a presumption of fraud and undue influence.

"3. That the circumstances attending the execution of the deeds to the three sons at Elbridge's house — the facts that the documents were prepared, by Elbridge's dictation, by an attorney employed by him, and who never saw the grantor nor communicated with him; that they were executed in Elbridge's house in the presence of himself and his family; that Elbridge brought the justice to his house, who only staid long enough to put the formal questions and receive a nod or a word in reply; that they were not read over to him; that the grantor's wife did not execute the deeds; that they embraced all his real estate; and that there was executed at the same time a bill of sale of all his per-

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sonal property; that Elbridge had charge of the grantor's affairs at the time under a power of attorney; and that the transaction was contrary to the grantor's previous declarations of his intention that the petitioner should be remembered in the disposition of his estate and have the Berlin woodlot — raise a presumption of fraud and undue influence.

"4. That there was no evidence of any delivery of said mortgage.

"5. That there was no evidence of any ratification of said deeds."

The judge did not give the instructions as prayed for; but did instruct the jury "that in order to avoid the deed it must appear that the influence, however obtained, was abused, or made use of improperly for the purpose of inducing the grantor to execute an instrument which was not in fact his own free act and deed; and that the various facts referred to in the petitioner's prayer for instructions, so far as proved, were for the consideration of the jury, who would give them such weight upon the several issues submitted to them, as in their judgment they were entitled to bear."

A verdict was returned for the respondents; and the petitioner alleged exceptions, which were argued in February 1869.

E. M. Bigelow, for the petitioner. 1. There was no evidence that the mortgage was ever delivered. The attesting witness never saw or communicated with the mortgagee. It was never recorded. The mortgagors produced it in court without showing that it had ever departed from their possession. See *Maynard* v. *Maynard*, 10 Mass. 458; *Powers* v. *Russell*, 13 Pick. 69; *Samson* v. *Thornton*, 3 Met. 281; *Younge* v. *Guilbeau*, 3 Wallace, 641; *Parmelee* v. *Simpson*, 5 Wallace, 86.

2. There was no evidence of ratification. The established doctrine is, that no mere parol acknowledgments, which were not intended to influence, and have not influenced, the conduct of any one, and no tacit acquiescence short of the period fixed by the statute of limitations, if uncoupled with acts of estoppel, will ratify the deed of one who at the time of executing it was an infant or of unsound mind. *Hovey* v. *Hobson*, 53 Maine,

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455, and cases cited. *Boody* v. *McKenney*, 23 Maine, 517, 523, 524. *Cresinger* v. *Welch's lessee*, 15 Ohio, 156, 193. *Tucker* v. *Moreland*, 10 Pet. 75. *Smith* v. *Kelley*, 13 Met. 310. *Dana* v. *Stearns*, 3 Cush. 375. *Gibson* v. *Soper*, 6 Gray, 281. *Proctor* v. *Sears*, 4 Allen, 95. *Lyon* v. *Reed*, 13 M. & W. 285. *Baylis* v. *Dineley*, 3 M. & S. 482. *Doe* v. *Allen*, 3 Taunt. 78. *Perry* v. *Davis*, 3 C. B. (N. S.) 769. *Lewis* v. *Clifton*, 14 C. B. 254. *Lee* v. *Bayes*, 18 C. B. 602.

3. The burden of proof as to soundness of mind is on the party setting up a deed; assent being an essential element of every contract. *Tyrrell* v. *Holt*, 1 Barnard. 12. *Gardner* v. *Gardner*, 12 Allen, 39. *Seaver* v. *Phelps*, 11 Pick. 306. *Hallett* v. *Oakes*, 1 Cush. 298. *Gardner* v. *Gardner*, 5 Cush. 483. It is so as to wills. *Sutton* v. *Sadler*, 3 C. B. (N. S.) 87. *Baxter* v. *Abbott*, 7 Gray, 83. There is nothing in the statute of wills or any of its revisions to indicate that any difference was intended between wills and deeds. The design was "only to provide that every individual who could by his own act lawfully aliene his estate whilst living might devise it at his death." *Osgood* v. *Breed*, 12 Mass. 530.

4. The first prayer for instructions should have been given. Where the mind is weak, the law has regard not so much to the means as to the motives, and to the unjust result. Shep. Touchst. 404, 405. *Tyler* v. *Gardiner*, 35 N. Y. 559. *Delafield* v. *Parish*, 25 N. Y. 1. *Harwood* v. *Baker*, 3 Moore P. C. 282–290. *Stewart* v. *Lispenard*, 26 Wend. 255. *Gardiner* v. *Gardiner*, 34 N. Y. 162.

T. H. Sweetser, (*W. B. Gale* with him,) cited, to the point of ratification of the deeds, *Allis* v. *Billings*, 6 Met. 415; *Arnold* v. *Richmond Iron Works*, 1 Gray, 434; to the point of the burden of proof, *Crowninshield* v. *Crowninshield*, 2 Gray, 524; *Loring* v. *Steineman*, 1 Met. 211; *Powers* v. *Russell*, 13 Pick. 76; *Phillips* v. *Ford*, 9 Pick. 39; and as to the second and third prayers for instructions, *Pettingill* v. *Porter*, 8 Allen, 1.

Hoar, J. 1. We are of opinion that there was some evidence of the delivery of the mortgage. Its weight or sufficiency is not open for consideration under this bill of exceptions. Execution

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of a deed in the presence of an attesting witness is evidence from which to infer a delivery. *Moore* v. *Hazelton*, 9 Allen, 102, and cases there cited. The authorities on which the petitioner relies are those in which the sufficiency of the evidence to establish the legal delivery of an instrument has been in question. Here the execution of the mortgage was not a necessary fact to be proved in the case. It came in merely incidentally, as one of the circumstances attending the principal transaction; and, though the evidence was very slight, the court could not be required to rule that there was none.

2. The evidence that the grantor in a deed remembered what he had done, and afterward spoke of it and gave his reasons for it, and did not express any regret or dissent, was properly admitted as tending to prove that he understood his act at the time, and that he ratified it. The deed of an insane person is not void, but voidable. The maker of it, or his legal representative, may avoid it: or, when in possession of his full powers of mind, if he recovers his reason, he may affirm and ratify it. The contract is not a nullity, but, until disaffirmed, is binding; and the sane party cannot repudiate it. *Allis* v. *Billings*, 6 Met. 415. *Arnold* v. *Richmond Iron Works*, 1 Gray, 434. *Gibson* v. *Soper*, 6 Gray, 279. Any distinct and decisive act of recognition as a valid and subsisting contract is competent evidence of ratification. A new delivery of the deed is not requisite, as it would be if the deed of an insane person were void.

3. The deed of an insane person being not void, but voidable only, it follows that the person who claims or takes title under a deed is not obliged to give any proof of the sanity of his grantor. The conveyance is binding upon the grantee, even if the grantor be insane, until it is avoided by the latter or his representative. In the case at bar, the petitioner claims title as heir to his grandfather. By proving his grandfather's seisin and his own descent, he makes out that title. The respondents introduce a deed from the grandfather, giving a prior title to them, and prove its execution by the grantor. They need prove nothing more. They need not show the sanity of the grantor, because the deed is good until avoided, and to have the right to

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avoid it the petitioner must show that the grantor was not of sound mind. The burden of proof was therefore rightly held to be upon the petitioner upon the issue of sanity. The authorities cited by the respondents' counsel will be found to turn upon the form of issues out of chancery, or other pleadings, in which the general rule is stated, of which there can be no doubt, that the party alleging an affirmative fact is bound to prove it. The rule of evidence as to wills depends upon different principles.

4. The instructions given to the jury appear to us to have contained all for which the petitioner asked which could properly or should have been given. The first instruction asked was given in substance, and with only such qualification as the law requires. Influence properly gained, although used for a selfish purpose, and to obtain an unjust and unfair advantage, will not avoid a deed thereby obtained, unless there is fraud or duress, or the influence is exerted by a stronger mind over a weak one, in such a manner and to such a degree as to substitute the will of the person exerting the influence in place of that of him upon whom it is exerted, so that the latter is no longer a free agent.

The facts set forth in the second and third prayers for instructions were submitted to the jury as evidence of fraud and undue influence. There is no legal presumption arising from them, but only a presumption of fact, of which the petitioner had the benefit, so far as the facts were established to the satisfaction of the jury. The court were not required to assume them to be proved; nor to give a hypothetical ruling upon them separately from the other evidence in the case.

Exceptions overruled.

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Memoranda.

On the seventh day of February 1868, Mr. Justice Chapman was appointed chief justice in place of Chief Justice Bigelow, resigned, and took his seat upon the bench as such on the tenth day of February.

On the fourteenth day of February 1868, the Honorable James D. Colt, of Pittsfield, was appointed a justice of this court, in place of Mr. Justice Chapman, appointed chief justice, and took his seat upon the bench on the third day of March at the term of the court then held at Boston in and for the county of Suffolk.

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CIVIL CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

AT THE

MARCH SESSION 1868, IN BOSTON.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. EBENEZER R. HOAR,
HON. HORACE GRAY, JR.,
HON. DWIGHT FOSTER,
HON. JOHN WELLS,
HON. JAMES D. COLT,
} JUSTICES.

SUFFOLK COUNTY.

WILLIAM MINOT, JR. *vs.* JULIA B. PAINE & others.

If a fund held in trust to pay the income to one until his death, and then convey the capital to another, includes shares in the stock of a corporation, shares of additional stock distributed to the trustee as a lawful dividend thereon accrue as capital, although they represent net earnings of the corporation.

BILL IN EQUITY, filed December 3, 1867, by the trustee under the will of Hannah F. Lee, to obtain the direction of the court concerning the application of certain shares in the stock of the Chicago, Burlington and Quincy Railroad Company, a corporation under the law of Illinois, and the Western Railroad Corporation, a corporation under the law of Massachusetts, distributed by said companies respectively to the trustee, by way of dividend on certain other shares of their respective corporate stocks belonging to the capital of the trust fund.

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The bill set forth that the will of Mrs. Lee was duly proved and allowed in the probate court for Suffolk on January 22, 1866, and declared a trust in the plaintiff, which he duly assumed, to hold and manage the estate of the testatrix as to him might seem prudent and judicious, with "full powers of sale and conveyance and change of investment in the management of the trust estate," and pay the net income thereof, as often as convenient, to her granddaughter Julia Bryant (since become by marriage Mrs. Paine) during her life, to her sole and separate use; and, on the death of said Julia, to convey the same in fee to such persons and on such terms as by her last will and testament, executed after her majority, she might appoint; and, in default of such appointment, or in event of her death during her minority, then to her issue, if any; and, in default of such issue, or of such appointment, then to the grandnieces of the testatrix, children of George L. Schuyler; and it set forth that the said Julia was still a minor.

It further set forth that on June 11, 1866, the testator purchased, as an investment of part of the capital of the trust fund, two hundred shares in the stock of the Chicago, Burlington and Quincy Railroad Corporation, for $23,150, being at the rate of about sixteen per cent. premium on their par value, which was $100 each; that thereafter on said shares he received from said company semi-annually, in May and November, cash dividends of five per cent. on their par value, until on September 17, 1867, he received another cash dividend of like amount, and at the same time a stock dividend of twenty per cent., to wit, forty shares of additional stock of the same par value, which two last dividends were declared by the directors of the company on August 21, 1867, by the following votes:

"*Voted*, to make a dividend of five dollars per share, the company to assume the United States' tax, payable September 15 to stockholders of record the 24th inst., after which date the transfer books will be closed until September 18.

"*Voted, also*, to distribute to stockholders of the 24th inst. one new share for every five held, to represent improvements on the road, construction of the Burlington Bridge, &c.; each holder

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of a fraction to receive a full share on paying up the balance to par."

It alleged that the plaintiff was informed and believed that said dividend of stock was made in part out of the earnings of the road accumulated before his purchase of the two hundred shares; but that he was ignorant what proportion of the expenditure represented by the stock dividend was made from earnings of the road accumulated before said purchase, and what from earnings accumulated afterwards; that he sold the forty shares distributed to him for $125 each, being at the rate of twenty-five per cent. premium on their par value, and was holding in his hands the proceeds of the sale, $5000; and that at the time of the filing of this bill the market value of said shares was about thirty-five per cent. above their par value.

The bill also set forth that, from the time of the probate of the will, the plaintiff held, as part of the capital of the trust fund, ten shares in the stock of the Western Railroad Corporation, which shares were charged to him in the inventory at the sum of $1400, or at a premium of forty per cent. on their par value, which was $100 each; and that, on July 12, 1867, he received from said corporation three additional shares of stock therein, as a dividend, pursuant to the following vote of its directors passed in June 1867:

"*Voted*, that the capital stock of this corporation be increased by the issue of 20,000 new shares, and that the treasurer be directed to distribute, on and after July 10, to the stockholders of record at the close of business on Saturday, the 8th inst., the number of full shares to which they may be respectively entitled, in the proportion of three new to ten old shares."

It recited that another vote, passed by the directors at the same time, made provision for fractional rights to stock in cases in which numbers of shares were held not evenly divisible by 10; and that both votes were passed in conformity with the recommendations of the report of a committee of directors to the full board on June 4, which set forth that "the large contingent fund of the corporation, which to a great extent has already gone into the construction of the road, the virtual ex-

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tinguishment of the debt of $1,000,000 to the city of Albany by the sinking fund provided for its payment, releasing the income of the road from the payment of interest on these bonds and contribution to the fund, aside from other considerations which might well be urged, but which it is not necessary now to present, fully require, as in justice to the stockholders, that 20,000 new shares of stock shall be issued and distributed according to the provisions of the votes" above named.

It alleged also that the plaintiff was holding "said three shares as a part of said trust fund;" and that at the time of the filing of the bill the market value of said shares was forty-five per cent. above their par value.

The bill further alleged that the *cestui que trust*, Mrs. Paine, claimed to be entitled to receive said stock dividends, or the proceeds thereof, as income of the trust fund, but that the trustee was "in doubt whether said dividends of said shares in said two corporations are income of the trust fund to be paid to the *cestui que trust*, or are capital to be retained by him and accounted for in the settlement of his trust."

The prayer was for the direction of the court "as to the true nature of said dividends of stock, and whether they are capital or income of the said trust fund, and as to the manner in which said trust in the particulars aforesaid may be safely and properly executed."

Mrs. Paine and the children of George L. Schuyler were made parties to the bill; and the former, by her guardian appointed *ad litem*, filed an answer admitting the truth of the allegations of the bill, and further setting forth "that said Western Railroad Corporation had, prior to June 8, 1867, expended from its net earnings, for purposes of permanent improvement of the road, namely, for the purposes indicated in the report of" the committee of the directors, as recited in the bill, "an amount equal to or exceeding the par value of the stock dividend made by said corporation; and that the said Chicago, Burlington and Quincy Railroad Company had, prior to August 24, 1867, expended from its net earnings for the permanent improvement of the road, additions to the road, and the purchase of property

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now held by said company, and which yields an income to it, an amount equal to or exceeding the par value of all the stock dividends made by said corporation;" and finally alleging that, "as between herself and the other defendants who are contingently entitled in remainder, the shares divided by the said two corporations, representing the sums taken from the income or dividend fund for the relief of the capital of said corporations, and for the permanent improvement of their roads, are, in justice and in law, income, and not capital, of the trust fund."

The answer of the latter corresponded with this answer, except that it alleged that "the shares in the capital stock of the said two corporations issued as aforesaid are, in justice and in law, not income, but capital, of the trust fund."

It was also admitted by all the defendants "that the corporations mentioned in the plaintiff's bill were, at the time of making the distributions of stock therein set forth, authorized by law to increase their capitals by issuing shares to an amount exceeding the shares so distributed by them, such authority being given in general terms, without special provisions or limitation as to the time, method or object of such increase."

The case was reserved by *Chapman*, C. J., on the bill and answers, and the aforesaid admission of the defendants, for the determination of the full court.

F. V. Balch, for Mrs. Paine.

A. G. Sedgwick, for Schuyler's children.

CHAPMAN, C. J. Under the will of Mrs. Lee, the shares in question were held by the trustee to pay over the net income thereof, as often as convenient, to Mrs. Paine, during her natural life, for her sole and separate use, &c.; and, on her death, to transfer and convey the same in fee to such persons, and on such terms, as Mrs. Paine, by her last will and testament, executed after her majority, may direct and appoint; and, in default of such will executed after her majority, or if she shall die a minor, then to her issue, if any, surviving her; and, in default of such issue or such will, then to the issue surviving her of the said George L. Schuyler; the trustee having full powers of sale and conveyance and change of investments in the management of the trust estate.

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The fact that the shares in the Western Railroad Corporation were received by the trustee as part of Mrs. Lee's estate, and that the shares in the Chicago, Burlington and Quincy Railroad Company were purchased by him as an investment, is not material to the present case.

In addition to the cash dividends which were declared by the directors of the Chicago, Burlington and Quincy Railroad Company, a dividend of twenty per cent. in stock was made in September 1867, and received by the trustee, which he sold for $5000, being twenty-five per cent. above the par value of the shares. And, in July 1867, the directors of the Western Railroad Corporation made a stock dividend, three shares of which came to him.

The question presented to the court is, whether these stock dividends, or either of them, are to be treated by him as income, belonging to Mrs. Paine, the tenant for life; or as capital, to be kept for the legatees of the stock in remainder, and of which Mrs. Paine is entitled to receive the income during her life.

The dividend made by the Chicago, Burlington and Quincy Railroad Company is stated in the vote of the directors to be made to represent expenditures for improvements on the road, the construction of the Burlington Bridge, &c.; and the pleadings admit that it was made from the net earnings of the road, for the permanent improvement of the road, and additions to the road, and the purchase of property now belonging to the road which yields a net income; and that the dividend made by the Western Railroad Corporation was made from its net earnings for purposes substantially similar. The votes are stated in the bill; but it is not necessary to refer to them more particularly.

The court do not regard the fact that the dividends were made from the net earnings of the roads as material. The net earnings of a railroad corporation remain the property of the company as fully as its other property, till the directors declare a dividend. A shareholder has no title to them prior to the dividend being declared. In most of our prosperous railroad corporations, the directors apply a considerable portion of their net

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income to the laying of additional tracks, the building of new depots, the increase of their rolling stock, and sometimes to the purchase of land which they deem important to the accommodation of their business, or to other permanent improvements of the road; and they have discretionary power to do so. It is true that they may abuse their power, and refuse to make any dividends, though their net income may be large; and apply their funds to the permanent improvement of the road, and thereby deprive a life tenant of all benefit from the shares, and reserve the whole income for the benefit of the remainderman. But in the present case it is not alleged that there has been any abuse of power; and it need not be decided whether, in case of such abuse, the trustee can protect the interests of the tenant for life in any other manner than by selling the shares and investing the trust fund in some other way by which he may obtain a reasonable income.

It is obvious that, if the directors had made no stock dividend, but had invested the income in permanent improvements, making no increase of the number of shares, the improvements would have been capital, belonging to the legatees in remainder. So, if they had thus invested it, and, instead of increasing the number of shares, had increased their par value, the shares would have been mere capital, and not income, as to the shareholders, though increased in value by the application of the net income of the road to that purpose. So, when they increase the number of shares, each share of all the stock in the corporation is in its nature capital. The new shares take their place among the old ones; and each of the old shares thereby becomes a less proportion of the whole stock than it was before, and is entitled to a less proportion of dividends declared than it was before. It may be that dividends are less per cent. than they would otherwise have been, and in such case the old stock is diminished in value, and the interest of the remainderman is injuriously affected. But, on the other hand, the effect may be, by increasing the business of the road, to increase the dividends and the market value of the old stock.

But neither courts nor trustees can investigate such matters

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with accuracy; and in many cases no investigation can be made. A trustee needs some plain principle to guide him; and the *cestuis que trust* ought not to be subjected to the expense of going behind the action of the directors, and investigating the concerns of the corporation, especially if it is out of our jurisdiction. A simple rule is, to regard cash dividends, however large, as income, and stock dividends, however made, as capital. The court are of opinion that this rule is more in conformity with the legal and equitable rights of shareholders than any other that has been suggested. It is also in conformity with the decisions of the court, so far as the subject has been considered.

In *Reed* v. *Head*, 6 Allen, 174, the cash dividends made by a land company were held to belong to the tenant for life, though they were derived from the sale of its real estate, which was its capital; this being its only method of earning dividends. On the other hand, where a gas light company increased the number of its shares, the right of a trustee to subscribe for new shares, which was a valuable right, was held to be the property of the legatee in remainder, and the sum realized by the sale of the right was directed to be invested for his benefit, the income to be paid to the legatee for life. *Atkins* v. *Albree*, 12 Allen, 359.

The subject has been much discussed by other courts; and, as it has been fully and ably argued, and is practically very important, it may be well to refer to the authorities.

The earlier English decisions have been unsatisfactory to the profession, and to the English courts. In *Brander* v. *Brander*, 4 Ves. 800, the bank had advanced to the government one million sterling, and had received for it £1,125,000 of five per cent. annuities. These were distributed among the stockholders. The testator had devised his bank stock to the plaintiff, subject to an annuity for life. Lord Chancellor Loughborough held that the dividends out of the £1,125,000 were accretion to the capital, and belonged to the remainderman, and that the tenant for life was entitled to receive only the income which it might earn. He said the same thing had been done when the bank increased their dividends, on the ground that there had been a gradual

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saving. To apply such a rule to the cash dividends made by corporations in this country, where dividends are so variable in amount, would be unreasonable and absurd.

In *Paris* v. *Paris*, 10 Ves. 185, an extra dividend was declared by the bank from the profits of the last half year. Lord Eldon decided the case on the authority of *Brander* v. *Brander*, and said it made no difference whether the dividend was in money or in stock. But he was unable to answer the argument made by Sir Samuel Romilly for the life tenant, or to state any satisfactory principle on which the two cases rested; and seemed to be dissatisfied with the result. In *Clayton* v. *Gresham*, 10 Ves. 288, the same rule was adopted in respect to an extraordinary dividend of profits made by the bank among the proprietors of the stock. In *Witts* v. *Steere*, 13 Ves. 363, Lord Erskine adopted the rule, but expressed doubts as to the correctness of the principle. In *Barclay* v. *Wainwright*, 14 Ves. 66, Lord Eldon, after reviewing the former case, decreed to the tenant for life an extra dividend of five per cent., made by the bank. This case was cited with approbation by Sir Thomas Plumer, V. C., in *Norris* v. *Harrison*, 2 Madd. 279.

In *Hooper* v. *Rossiter*, McClel. 527, Lord Chief Baron Alexander said it seemed clear from all the cases, from the first to the last, that, wherever the addition was made clearly and distinctly as a dividend only, the tenant for life was to have it; but, wherever it was not clearly given as a dividend, it was considered as an accretion to the capital, divisible amongst the proprietors.

In *Price* v. *Anderson*, 15 Sim. 473, an increased dividend made by an insurance company was held to be income. Shadwell, V. C., said that the company might have declared, if they had thought proper to do so, that a part should be dividend and a part capital. But, as they had declared the whole to be dividend, he held that it belonged to the tenant for life. He refused to go behind the action of the company, and recognized their discretionary power. This discretionary power of a company over its earnings is certainly a very essential element in its bearing upon the respective rights of tenant for life and remainderman.

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In *Bates* v. *Mackinley*, 31 Beav. 280, dividends and bonuses earned before the testator's death, but declared afterwards, were held to be income belonging to the tenant for life. In *Johnson* v. *Johnson*, 15 Jur. 714, a bonus, or increased dividend of £10 per share, in addition to the usual dividend, was held to be income, and not capital. In *Murray* v. *Glasse*, 17 Jur. 816, dividends on Mexican Mint shares, and also bonuses declared out of profits, were held to belong to the tenant for life. In *Cuming* v. *Boswell*, 2 Jur. (N. S.) 1005, in the house of lords, bonuses were held to be income; and the earlier cases cited above were spoken of by Lord Cranworth as not resting on very solid ground.

In re Barton's trust, Law Rep. 5 Eq. 238, the testator left five shares in the India General Steam Navigation Company. The company added three new shares to the original five, out of the earnings of their steamers for the last half year, to be applied to the cost of new steamers; and the new shares were issued to represent the money so applied. A dividend was made of the remaining portion of the earnings. Vice-Chancellor Wood held that the new shares were capital and not income; that the company had power to make such an appropriation of a part of their profits; and that a shareholder was bound by the action of the majority.

Clive v. *Clive*, Kay, 600, *Plumbe* v. *Neild*, 6 Jur. (N. S.) 529, and *Wright* v. *Tuckett*, 1 Johns. & Hem. 266, may be referred to, but do not need to be noticed particularly.

From this review of the English cases, it appears that the case of *Brander* v. *Brander*, and the principle on which it rests, are regarded in England as unsatisfactory; and that there is no reason why we should follow it.

The cases cited from New York have been decided in their supreme court, and not by their highest tribunal. In *Clarkson* v. *Clarkson*, 18 Barb. 646, it was held that extra dividends were to be regarded as profits; but bonds or certificates given by a railroad for the purpose of consolidation with another road were capital, and belonged to the remainderman. James, J., expresses dissatisfaction with *Brander* v. *Brander*, and the cases which follow it. In *Simpson* v. *Moore*, 30 Barb. 638, the subject

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of the bequest was bank stock. The charter of the bank expired, and a dividend of eighteen per cent. was declared, with an option to stockholders to invest it in a renewed charter. It was held that the dividend was profits, except so far as it impaired the capital. So far as it did that, it was directed to be retained as capital, and the balance to be paid to the tenant for life. These cases do not differ from the views we have expressed.

In *Earp's case*, 28 Penn. State, 368, the capital stock was increased by the creation of new shares. A dividend of the shares was made, and they were paid for out of the profits of the business. It was held that the additional shares should go to the legatee for life as income. But in that case the fact that the corporation has, within the limits of its charter, the power to withhold dividends, and use all its funds in such a way as merely to increase its property, is not discussed.

On this point the case of *Pratt* v. *Pratt*, 33 Conn. 446, is pertinent. The court held that, where the directors of a manufacturing corporation were about to invest their income in the erection of new buildings and machinery, and enlarge their business within the limits of their chartered authority, a case was not made for equitable interference by injunction in favor of a minority of dissenting stockholders.

This case illustrates the principle applicable to the present case. The money in the hands of the directors may be income to the corporation; but it is not so to a stockholder till a dividend is made; and, where the company invest it in buildings and machinery, or in railroad tracks, depots, rolling stock, or any other permanent improvements, for enlarging or carrying on their legitimate business, it never becomes income to the shareholder. The investment becomes an accretion to the capital; and it is equally so whether they increase the number of shares, or the par value of shares, or leave the shares unaltered. Or if the number of shares is increased for purposes merely speculative, it is an increase of capital stock, and not of income; and it would be practically unwise for courts to go behind the action of the company and attempt to ascertain how they came

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by the funds out of which they declare either cash or stock dividends.

As the corporation is the legal owner of the property, and has power, within the limits of its charter, to give to the shareholders either an increase of income or an increase of capital, out of the money in its hands, according to the discretion of its directors, it would seem to follow that an increase of capital should be kept for the remainderman, and an increase of income should be paid to the tenant for life. This rule appears to be in conformity with the intention of the testator who gives personal property in this manner. He is held to have the interest of the successive takers equally in view. *Kinmonth* v. *Brigham*, 5 Allen, 270.

The equitable rights of the *cestuis que trust* will thus coincide with the legal rights of the legal holder of the stock, who holds his shares as his capital, and his cash dividends as his income from that capital. As to him, a stock dividend is an accretion to his capital; and there is nothing to show that the testator intended that it should be otherwise as between the successive takers of his bounty.

Decree that the new shares be held as capital for the legatee in remainder; the income to be paid to the legatee for life.

JULIUS S. SHAILER *vs.* JOSIAH F. BUMSTEAD & others.

On the trial of issues whether the execution of a will was procured by fraud or undue influence, and whether the will was executed by the testatrix in ignorance of its contents, after the introduction of evidence of a previous condition of her mind having relation to the disposal of her property, evidence of her subsequent acts or declarations is admissible to prove the subsequent existence of that condition, if such acts or declarations are significant of a condition sufficiently permanent in its nature, and occurred so soon after the execution of the will as to afford a reasonable inference that such was then also the condition of her mind; but such evidence is inadmissible to prove the actual fact of fraud or undue influence in another.

On the trial of issues whether the execution of a will was procured by fraud or undue influence, and whether the will was executed by the testatrix in ignorance of its contents, evidence of her subsequent acts or declarations indicating dissatisfaction with or ignorance of

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its contents is admissible to rebut any presumption of the free execution of the will which may arise from the fact that it remained unrevoked for any considerable time.

On the offer of a will for probate, evidence of declarations or acts of parties to the record, subsequent to the execution of the will, whether before or after the death of the testatrix, is inadmissible to prove that the will "was contrary to her intentions, or that she was ignorant of its contents, and that it was procured by fraud and undue influence of" such parties, if there are other parties to be affected thereby who are not jointly interested nor in privity with them.

On the offer of a will for probate, the testatrix is not such "an original party to the contract or cause of action" as to render any party to the record incompetent as a witness, under the Gen. Sts. *c.* 131, § 14.

On the trial of the validity of a will executed when the testatrix was seventy-eight years old, there is no ground of exception to the exclusion of evidence of her mental and moral condition fifteen months afterwards, when she was affected with paralysis; and also of evidence of her bodily and mental condition at subsequent periods until her death at the age of ninety-one; which is offered to prove that she was weak in body and mind when she executed the will.

On the trial of the validity of a will executed when the testatrix was seventy-eight years old, there is no ground of exception to the exclusion of evidence "that several of her family had been in advanced age affected with paralysis accompanied by an enfeebling of the mental and moral powers, and that it was a family tendency," which is offered "as bearing on the question of the condition of her mental and bodily powers" at the time when she executed the will, and for the introduction of which the only foundation laid is, evidence that two years before that time she complained of feeling numb, and at that time and afterwards was physically weak and somnolent and mentally inactive, and an offer of evidence that fifteen months after executing the will she was affected with paralysis.

On an appeal from the allowance, as the last will of a person deceased, of a will, and of a codicil thereto executed several years afterwards, like issues for a jury, including the issue whether the execution of the instrument was procured by fraud or undue influence, having been framed, as to a will executed several years previously; as to the will allowed; and as to the codicil thereto; it was alleged that, during the interval between the execution of the will allowed and the execution of the codicil, the physical and mental powers of the testatrix were seriously affected by sickness; whereupon the judge denied a request of the appellants for a trial of the issues as to all the instruments together, and directed a separate trial thereof as to each instrument, commencing with the will allowed. *Held*, that there was no ground of exception to this denial and direction.

Appeals by Julius S. Shailer, executor, the Massachusetts Baptist State Convention, and certain heirs at law of Miss Sarah Bumstead, from a decree of the judge of probate, allowing a a will, dated April 7, 1853, and a codicil thereto, dated September 30, 1857, as the last will of Miss Bumstead, who died on March 21, 1865, at the age of ninety-one years.

Trial at October term 1867, before *Wells*, J., who reported the case for the revision of the full court in substance as follows:

The testatrix made a will on July 3, 1851, disposing of part

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of her estate, giving the same to the Massachusetts Baptist State Convention, and naming no executors. The will of April 7, 1853, revoked the former one, made less valuable provision for the Baptist Convention, and named Michael Hayden and Julius S. Shailer executors. The codicil thereto, of September 30, 1857, gave the residue of her estate to Hayden, revoked the appointment of Shailer as executor, and named Hayden to be "sole executor of my said will, and with the consultation of said Julius S. Shailer to have the settlement of my estate."

"Issues were framed as to each of these three instruments, in accordance with the allegations of the heirs at law, as follows: 1. That the testatrix was of unsound mind. 2. That the execution of the instrument was procured by the fraud and undue influence of Hayden and Shailer. 3. That the instrument was signed by the testatrix in ignorance of its contents. 4. That the will of 1853 had been fraudulently altered by Hayden or Shailer.

"At the hearing to frame issues, the Baptist State Convention and the heirs at law insisted that all the issues in all the cases should be tried together. But it being alleged that the testatrix had suffered from a severe illness between 1853 and 1857, by which both her bodily and mental powers were seriously affected, it was ordered that the issues relating to the several instruments be tried separately, unless the judge who should preside at the trial should otherwise direct.

"At April term 1867 the issues relating to the will of 1853 were submitted to a jury, and a verdict rendered in support of the will upon the 1st and 4th issues, and against it upon the 2d and 3d issues; but the verdict was set aside as to the 2d and 3d issues, on the ground that it was contrary to the evidence, or without sufficient evidence. At October term 1867 the counsel for the contestants again applied to have the issues in all the cases tried together, and offered to waive the question of sanity of the testatrix in the other cases. But this request was denied, and the case directed to be submitted to the jury upon the two remaining issues relating to the will of 1853 alone."

At the present trial, it appeared that the testatrix, at the date

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of this will, was in her seventy-ninth year and had never been married; that in former years she had been very active, attending to her own business affairs; was of a decided character, not inclined to familiarity with those who approached her, but insisting upon deference from every one; and was a Baptist, and very strong in her religious belief; that in 1843 she owned a parcel of land upon Washington Street in Boston, on which were some wooden buildings of little value, in one of which she lived alone, and during that year Michael Hayden married one of her nieces, from which time until several years later than 1853 she with Hayden and his wife lived together as one family; that there was no issue of this marriage, and Mrs. Hayden died before the testatrix; that Julius S. Shailer was a Baptist minister, and from 1845 to 1854 was pastor of the society to which the testatrix belonged; and that in 1847 three shops were built on the front part of the land on Washington Street, and in 1852 four dwelling-houses on the back part.

"The contestants relied upon evidence of declarations of Miss Bumstead, made at the time of executing the will of 1851, and also both before and after that time, to the effect that she intended to devote the front lot as a sacred offering to the Lord, through the Baptist State Convention, and that she intended the back lot to be kept for the use of her needy relatives; from which they contended that it appeared that she had had a long cherished, settled and unvarying purpose" which was inconsistent with the provisions of the will of 1853; and they relied on the character and effect of these provisions to show that the will of 1853 could not have been the product of a free exercise of her mind.

"To prove that the testatrix was weak in body and mind at the time of executing the will, evidence was produced tending to show that she had ceased to attend to her business affairs, except to look over plans and accounts with Hayden or Shailer; that she did not attempt to write, and did little or no work of any kind; that when attempting to read she would very soon fall asleep; and that she walked, when going to church or elsewhere, with a shuffling of her feet, and leaning generally upon

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the arm of Mr. or Mrs. Hayden. There was evidence that she would sometimes laugh and cry or whine at trifling causes; but the time when this occurred was not very definitely fixed. One witness testified that upon the occasion of a visit at the house in 1851 Miss Bumstead complained of a feeling of numbness. The contestants then offered to show by the same witness that at another visit, in July 1854, she found the testatrix affected with paralysis; and also to prove facts showing her mental and moral condition at that time. This evidence was excluded, as being too long after the date of the will on trial. The contestants then proposed to show that several of her family had been in advanced age affected with paralysis, accompanied by an enfeebling of the mental and moral powers, and that it was a family tendency; and claimed to connect the fact of her condition in 1854 with the numbness complained of in 1851, and the family tendency, as bearing upon the question of the condition of her mental and bodily powers in 1853;" but this testimony also was excluded.

"Evidence of her bodily and mental condition, at various periods subsequent to July 1854, and until her death in 1865, was also offered and rejected.

"To show undue influence by Hayden, various witnesses, mostly relatives, were called to testify to visits at various periods, whose testimony tended to show that Hayden had charge of all the property and business of Miss Bumstead; that she relied upon and demanded his constant attentions; that there was great familiarity between them, and tokens of affection; and that he or Mrs. Hayden always attended her to church or elsewhere when she went out. The witnesses generally testified that when visiting at the house they did not remember to have been ever left alone with Miss Bumstead; but there was no evidence that any of her relatives or friends were prevented from seeing her as they wished, nor that they might not have seen her alone if they had sought to do so, except as to two or three persons against whom Hayden made some objection on personal grounds.

"It also appeared that the testatrix was accustomed to con-

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sult Shailer in regard to her business affairs and plans, and was attached to and confided in him; and he testified, on cross-examination, that he was her confidential adviser." And it appeared "that Hayden and Shailer went to the office of John J. Clarke, a counsellor at law, with a draft or memorandum which Shailer had written out, as he afterwards testified, under her direction, and employed him to prepare her will; that Mr. Clarke prepared the will, consulting with Hayden and Shailer only, and not seeing the testatrix at all, although it was testified that she was able to go abroad from her home; and Mr. Clarke testified that he should have gone to see her at her house, if he had been requested so to do. Hayden testified that he took the will so prepared to Miss Bumstead. It appeared that Hayden and Shailer were both present when it was executed, some days after it was so placed in her hands, and that after execution it was placed in Shailer's hands to be kept. Hayden testified that when he handed the will to Miss Bumstead, she took it and appeared to be reading it when he left the room. Shailer testified that on the day of execution of the will, and before its execution, he read it over to Miss Bumstead at her request.

"The attesting witnesses were a brother, sister, and brother-in-law of Hayden, who were not informed of the contents of the will. No persons were present except the testatrix, the attesting witnesses, and Hayden and Shailer; and it did not appear that the testatrix ever saw the will afterwards.

"As further evidence that the will so made was contrary to the real intentions of the testatrix, or that she was ignorant of its contents, and that it was procured by fraud and undue influence of Hayden and Shailer, the contestants offered to prove declarations of the testatrix, and of Hayden and Shailer, subsequent to the date of the will; and conduct of Hayden and Shailer in relation to the property and business of Miss Bumstead. The evidence of such subsequent declarations and conduct was excluded, so far as offered for that purpose; but the contestants were allowed to put in any evidence tending to show that relatives and friends were prevented or deterred in any way from free access to and communication with the testatrix, or that she

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was in any way prevented from revoking or making any change in her will, if she had desired to do so." The evidence thus excluded, aside from declarations, comprised, among other things, deeds of real estate from the testatrix to Hayden, dated respectively March 21, 1854, and April 24, 1857; a mortgage to J. P. Cushing of both lots of the real estate on Washington Street, and an offer of proof, in connection with this mortgage, that it was made at the suggestion of Hayden and Shailer, and that Hayden received the proceeds of it; the codicil, dated September 30, 1857; the appointment of Shailer, in December 1859, to be guardian of the testatrix as *non compos mentis*, and some of his proceedings as guardian; the writ and other papers in an action brought by Hayden in 1863 against the testatrix on two promissory notes, dated respectively in 1850 and 1852; the petitions of Hayden and Shailer, severally, to be appointed special administrator of the estate of the deceased, and the appointment of them jointly in June 1865; the inventory, and appraisal of the estate in December 1865; the amount of personal estate found by a special administrator appointed in the place of Hayden and Shailer; and evidence that no final account had been rendered by Shailer as guardian, nor any by Shailer and Hayden as special administrators.

"In reply, both Hayden and Shailer were examined as witnesses in support of the will. The contestants objected to their competency, but the objection was overruled.

"Hayden having denied, on cross-examination, that he had ever received any compensation for his services rendered to Miss Bumstead in taking the care and oversight of her property and business affairs, was allowed to be interrogated in further cross-examination as to the consideration for her deed to him in 1857. The contestants then offered again to put the deed in evidence, to rebut any inference that such services were an inducement to the devise to him; but, as it did not tend in any manner to contradict the witness, the judge ruled that it was not competent for any other purpose, and excluded it.

"In cross-examination of Shailer, the contestants proposed to prove by him, that in 1855, at the request of Miss Bumstead, he

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audited Hayden's accounts relative to her business, in consequence of her being dissatisfied with them; and that, although dissatisfied, she still continued Hayden in charge of the property. This evidence was excluded."

The jury returned a verdict answering both issues in the negative.

W. R. P. Washburn & H. G. Parker, for certain heirs at law.

F. W. Sawyer, for other heirs at law.

B. F. Brooks, for the Baptist Convention.

W. Gaston & W. S. Leland, for Shailer.

G. A. Somerby, for Hayden.

COLT, J. Several questions arising upon the admission and rejection of evidence at the trial are presented by this report. One of the most important, whether we regard its practical consequences, or the apparent, and to some extent real, conflict of authority, relates to the admissibility of the declarations of the testatrix made after the execution of the will. Such declarations were offered to sustain the allegations of fraud and undue influence, and ignorance of its contents, and were excluded.

That the instrument which contains the testamentary disposition of a competent person, executed freely and with all requisite legal formalities, must stand as the only evidence of such disposal, is generally conceded. Such a will is not to be controlled in its plain meaning by evidence of verbal statements inconsistent with it; nor impaired in its validity and effect by afterthoughts or changes in the wishes or purposes of the maker, however distinctly asserted. It is to be revoked only by some formal written instrument, some intentional act of destruction or cancellation, or such change of circumstances as amounts in law to a revocation.

Any invasion of this rule opens the way to fraud and perjury; promotes controversy; destroys to a greater or less degree that security which should be afforded to the exercise of the power to control the succession to one's property after death. But the rule assumes that the will sought to be affected has once had a valid existence. It is always liable to be impeached by any competent evidence that it was never executed with the required

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formality, was not the act of one possessed of testamentary capacity, or was obtained by such fraud and undue influence as to subvert the real intentions and will of the maker. The declarations of the testator accompanying the act must always be resorted to as the most satisfactory evidence to sustain or defend the will whenever this issue is presented. So it is uniformly held that the previous declarations of the testator, offered to prove the mental facts involved, are competent. Intention, purpose, mental peculiarity and condition, are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of the mind is the fact to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statement is of no consequence. As a narration, it is not received as evidence of the fact stated. It is only to be used as showing what manner of man he is who makes it. If therefore the statement or declaration offered has a tendency to prove a condition not in its nature temporary and transient, then, by the aid of the recognized rule that what is once proved to exist must be presumed to continue till the contrary be shown, the declaration, though prior in time to the act the validity of which is questioned, is admissible. Its weight will depend upon its significance and proximity. It may be so remote in point of time, or so altered in its import by subsequent changes in the circumstances of the maker, as to be wholly immaterial, and wisely to be rejected by the judge.

Upon the question of capacity to make a will, evidence of this description is constantly received; and when the issue is one of fraud and undue influence it is equally material. The requisite mental qualification to make a will might exist, and be entirely consistent with such a degree of weakness, or such peculiarity, as would make the party the easy victim of fraud and improper influence.

The evidence is here offered only to establish the allegations of ignorance of the will, and of fraud and undue influence. The verdict of the jury at a former trial having established, beyond controversy now, that the will was made by one in possession of the requisite testamentary capacity, its admissibility is to be considered only upon the remaining issue.

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To establish the charge of fraud and undue influence, two points must be sustained: first, the fact of the deception practised, or the influence exercised; and, next, that this fraud and influence were effectual in producing the alleged result, misleading or overcoming the party in this particular act. The evidence under the first branch embraces all those exterior acts and declarations of others used and contrived to defraud or control the testator; and under the last includes all that may tend to show that the testator was of that peculiar mental structure, was possessed of those intrinsic or accidental qualities, was subject to such passion or prejudice, of such perverse or feeble will, or so mentally infirm in any respect, as to render it probable that the efforts used were successful in producing in the will offered the combined result. The purpose of the evidence in this direction is to establish that liability of the testator to be easily affected by fraud or undue influence, which constitutes the necessary counterpart and complement of the other facts to be proved. Without such proof, the issue can seldom, if ever, be maintained. It is said to be doubtful whether the existence and exercise of undue influence does not necessarily presuppose weakness of mind, and whether the acts of one who was in all respects sound can be set aside on that ground in the absence of proof of fraud or imposition. And it is certain that, however ingenious the fraud or coercive the influence may be, it is of no consequence, if there was intelligence enough to detect and strength enough to resist them.

The inquiry is of course directed to the condition at the date of the execution of the will; but the entire moral and intellectual development of the testator at that time is more or less involved; not alone those substantive and inherent qualities which enter into the constitution of the man, but those less permanent features which may be said to belong to and spring from the affections and emotions, as well as those morbid developments which have their origin in some physical disturbance. All that is peculiar in temperament or modes of thought, the idiosyncrasies of the man, so far as susceptibility is thereby shown, present proper considerations for the jury. They must

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be satisfied, by a comparison of the will, in all its provisions, and under all the exterior influences which were brought to bear upon its execution, with the maker of it as he then was, that such a will could not be the result of the free and uncontrolled action of such a man so operated upon, before they can by their verdict invalidate it.

As before stated, the previous conduct and declarations are admissible; and so, by the weight of authority and upon principle, are subsequent declarations, when they denote the mental fact to be proved. For, by common observation and experience, the existence of many forms of mental development, especially that of weakness in those faculties which are an essential part of the mind itself, when once proved, imply that the infirmity must have existed for some considerable time. The inference is quite as conclusive that such condition must have had a gradual and progressive development, requiring antecedent lapse of time, as that it will continue, when once proved, for any considerable period thereafter. The decay and loss of vigor which often accompanies old age furnishes the most common illustration of this. It is difficult to say that declarations offered to establish mental facts of this description are of equal weight, whether occurring before or after the act in question. But, if they are equally significant and no more remote in point of time, they are equally competent, and may be quite as influential with the jury.

The difficulty in the admission of these subsequent statements of the testator has been, that, while competent for the purpose above indicated, they are not, by the better reason and the most authoritative decisions, admissible to establish the fact of fraud and undue influence as one of the constituent elements of the issue. When used for such purpose, they are mere hearsay, which, by reason of the death of the party whose statements are so offered, can never be explained or contradicted by him. Obtained, it may be, by deception or persuasion, and always liable to the infirmities of human recollection, their admission for such purpose would go far to destroy the security which it is essential to preserve. The declaration is not to be wholly rejected,

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however, if admissible on other grounds; and it must be left to the judge carefully to point out how far it is to be rejected or received as evidence by the jury.

Ordinarily we should expect more or less evidence of the prior existence of those peculiarities which the subsequent declarations give evidence of; and in the reported cases this will generally be found to be so. It is not necessary to decide whether, in the entire absence of such evidence, subsequent declarations would ever be competent. Where a foundation is laid by evidence tending to show a previous state of mind, and its continued existence past the time of the execution of the will is attempted to be proved by subsequent conduct and declarations, such declarations are admissible, provided they are significant of a condition sufficiently permanent, and are made so near the time as to afford a reasonable inference that such was the state at the time in question.

The doctrines thus stated are maintained by the current of English and American authority.

In *Provis* v. *Reed*, 5 Bing. 435, the statements of the testator which were offered were regarded by the court as offered to prove specific acts of fraud and improper influence. The distinction here suggested does not seem to have been required in the case, and such statements were emphatically declared inadmissible, by Best, C. J., as rendering useless the precaution of making a will. The same doctrine is recognized, and the principle discussed, in *Marston* v. *Roe*, 8 Ad. & El. 14, where Tindal, C. J., goes somewhat fully into the matter, although the precise question was upon the revocation of the will.

In New York, in the case of *Jackson* v. *Kniffen*, 2 Johns. 31, the point was raised and decided; and the statement of the testator, that he had executed the will by force and for fear of being murdered, was rejected. The distinction taken in the more recent cases between such proof of exterior facts and such proof of mental *status* is not alluded to. And Spencer, J., in his dissenting opinion, favors the admission of the declarations, on the ground that they were the declarations of the sole party in interest at the time, because no one else could have an interest in a

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will, living the testator. The whole matter is discussed more fully, and the distinctions accurately pointed out, in *Waterman* v. *Whitney*, 1 Kernan, 157. Subsequent declarations inconsistent with the will, in connection with other evidence tending to prove want of mental capacity, are held by Selden, J., and a majority of the court, to be competent, upon a full review of the decisions.

In Connecticut the same rule prevails, and was stated in *Comstock* v. *Hadlyme Ecclesiastical Society*, 8 Conn. 254.

In Vermont, in the case of *Robinson* v. *Hutchinson*, 26 Verm. 47, where the question is fully considered, Isham, J., says: "We do not perceive any serious objection to the admission of this testimony, under that limitation, when the declarations were made so near the time of the execution of the will that a reasonable conclusion may be drawn as to the state of mind of the testatrix at the time the will was executed. Weakness of mind arising from advanced age, in connection with causes suggested in this case, is progressive and permanent in character. It exists in the mind itself, and therefore it is that weakness of mind at the time of making the will may be inferred from weakness subsequent, as much so as imbecility of mind under similar circumstances."

In *Moritz* v. *Brough*, 16 S. & R. 402, the supreme court of Pennsylvania held declarations admissible to show mental condition. See also *McTaggart* v. *Thompson*, 14 Penn. State, 149, 154.

In the recent case of *Boylan* v. *Meeker*, 4 Dutcher, 274, the whole subject is discussed. The issues there were, incapacity, forgery of the will, fraud practised by inducing signature to a paper without knowledge that it was a will. The court say that upon a review of the case no doubt can be entertained of the testator's capacity. The contestants relied on the conduct and declarations of the testator to show that he never knew afterwards of the existence of the will, and therefore could not have knowingly executed the paper. It appears that the declarations were offered on the broad ground that, even if the testator had testamentary capacity, yet he never executed the will, because

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of his declared ignorance of any such paper. In the discussion of the case, the court seem to regard ignorance of a fact existing at any particular time as not evidence of a state of mind in any sense affecting its capacity. But, however this may be, the whole case clearly recognizes the admissibility of subsequent declarations to prove mental condition, and is in harmony with the main current of authority. The declarations were held incompetent in that case, but it was upon the ground that the evidence was offered to support the act of fraud charged, and had no tendency to establish mental condition.

Two cases in North Carolina are apparently in conflict with these authorities. *Reel* v. *Reel*, 1 Hawks, 248. *Howell* v. *Barden*, 3 Dev. 442. In the first of these, the court follow, and approve of, the dissenting opinion of Spencer, J., in *Jackson* v. *Kniffen*, *supra;* and, in the last case, the court, by Ruffin, J., declare themselves bound by the former decision. It does not appear what were the precise declarations in this case; but in *Reel* v. *Reel*, in connection with the evidence that the mind of the testator had been greatly impaired by previous habits of intoxication, and had been weak from his youth, the declarations admitted may be held competent, without overruling *Jackson* v. *Kniffen*. See also *Cawthorn* v. *Haynes*, 24 Missouri, 236; 3 Lead. Cas. in Eq. (3d Am. ed.) 503, note; 1 Redfield on Wills, 551–561.

This discussion, though thus prolonged, may not be dismissed without presenting another view upon which the evidence under consideration may be competent. A will made when fraud or compulsion is used may nevertheless be shown to be the free act of the party, by proof of statements in which the will and its provisions are approved, made when relieved of any improper influence or coercion. It is always open to inquiry whether undue influence in any case operated to produce the will; and, as the will is ambulatory during life, the conduct and declarations of the testator upon that point are entitled to some weight. Indeed, the fact alone that the will, executed with due solemnity by a competent person, is suffered to remain unrevoked for any considerable time after the alleged causes have ceased to oper-

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ate, is evidence that it was fairly executed; to meet which, to some extent at least, statements of dissatisfaction with or want of knowledge of its contents are worthy of consideration and clearly competent, however slight their influence in overcoming the fact that there is no revocation.

All this evidence, under whatever view it is admitted, is competent only and always to establish the influence and effect of the external acts upon the testator himself; never to prove the actual fact of fraud or improper influence in another.

Coming now to the application of these rules to the case here presented, we cannot avoid the conclusion that the report shows that evidence of the subsequent declarations of the testatrix, to the effect that the will so made was contrary to her real intentions, or that she was ignorant of its contents, should have been admitted. The character and habits of the testatrix in her better days, the whole of her later life, with her expressed purposes and wishes up to the time of the will, were exhibited in evidence. With a considerable degree of physical weakness, that loss of vigor and activity in the mind, which indicates in persons of her habits and years the increasing infirmities and decay of old age, was shown to exist at and before the date of the will, for the purpose of increasing the probability that she was the victim of the improper designs of others.

The precise statements are not reported, nor does it appear at what precise time they were made, but they were offered to show either ignorance of the contents of the will, or that they were contrary to her real intentions, and that the will was improperly obtained by the fraud and undue influence of the executors named.

As we have already seen, this evidence was not competent as a declaration or narrative to show the fact of fraud or undue influence at a previous period. But it was admissible not only to show retention or loss of memory, tenacity or vacillation of purpose existing at the date of the will, but also in proof of long cherished purposes, settled convictions, deeply rooted feelings, opinions, affections or prejudices, or other intrinsic or enduring peculiarities of mind, inconsistent with the dispositions made

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in the instrument attempted to be set up as the formal and deliberate expression of the testatrix's will; as well as to rebut any inference arising from the non-revocation of the instrument. They were not rejected as too remote in point of time, or as having no tendency in their character to sustain the fact claimed to exist.

In connection with the evidence thus offered and rejected, the contestants offered also the declarations and conduct of Hayden and Shailer, named executors, subsequent to the date of the will. And this brings us to another important question in the case. The evidence, for the purpose for which it was offered, was, we think, properly excluded. It was not proposed thereby to contradict their testimony. The admissions of a party to the record against his interest are, as a general rule, competent against him; and this rule applies to all cases where there is an interest in the suit, although other joint parties in interest may be injuriously affected. But it does not apply to cases where there are other parties to be affected who have not a joint interest, or do not stand in some relation of privity to the party whose admission is relied upon. A mere community of interest is not sufficient. Devisees or legatees have not that joint interest in the will which will make the admissions of one, though he be a party appellant or appellee from the decree of the probate court allowing the will, admissible against the other legatees. In modern practice, at law even, the admissions of a party to the record who has no interest in the matter will not be permitted to be given in evidence to the prejudice of the real party in interest.

In this case, it does not appear at what time after the date of the will these declarations were made, whether before or after the death of the testatrix, or before or after the offer of the will for probate; and perhaps it is not material. They stand upon the same ground with statements made at any time since the date of the will, by any other devisee or legatee named in the will, or heir at law or legatee under the former will of 1851, whose interests are affected and who is a party to this record. Before the death of the testatrix, the interest of all these parties

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in a will, liable at any time to be revoked, was not such a direct interest as should render their admissions competent against other parties. The separate admissions of each, made after the act, that the will was procured by their joint acts of fraud or undue influence, cannot be permitted to prejudice the other. Such statements are only admissible when they are made during the prosecution of the joint enterprise. Admitting for the present that any interest in a will obtained by undue influence cannot be held by third parties, however innocent of the fraud, and that the gift must be taken tainted with the fraud of the person procuring it, still it by no means follows that the interest of the other innocent legatees should be liable to be divested by the subsequent statements of the parties procuring the will. Such a rule would violate all sense of right, and is not sustained by the decisions.

The principal case, most often cited in support of the doctrine that such admissions are competent, is *Atkins* v. *Sanger*, 1 Pick. 192. The will was contested on the ground that the testatrix was not of sound mind and had been unduly practised upon. The declarations of one of the executors named, who were the principal legatees, were offered to show the circumstances attending the making of the will. Their admissibility was expressly urged on the ground that the parties to the record could not, as the law then was, be called as witnesses, and there was no way of proving the facts. The chief justice, after a short consultation with his brethren, said the court were inclined to admit the declarations as to facts which took place at the making of the will, but added that the decision did not interfere with *Phelps* v. *Hartwell*, 1 Mass. 72. This is the whole of the case. It is to be noted that the case was heard before the full court without a jury. The rule may have been less carefully laid down than it would have been if the question had arisen on the admissibility of the evidence in a jury trial. Under the present law of this Commonwealth making parties to the record witnesses, illustrated in this very case by calling the parties whose admissions were offered and subjecting them to the cross-examination of the contestants, we cannot think

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the rule now contended for would have been adopted, as it seems to have been in *Atkins* v. *Sanger*.

In *Ware* v. *Ware*, 8 Greenl. 42, which was an appeal from the decree allowing probate of John Ware's will, the appellee was permitted to prove that Abel Ware, the only appellant, said, two or three weeks before the death of the testator, that he had his senses. This case, so far as it permits the opinions of a party on the question of sanity to be put in evidence against him, is in conflict with *Phelps* v. *Hartwell*, *supra*; but on a closer examination it seems to be in harmony with the law as here stated. It does not appear that the appellant was not the sole party in interest. The fact that he was alone interested is to be inferred; for Mellen, J., in reference to this point, says that by law the confessions of a party may always be given against him and his interest, but not thereby to defeat or impair the rights of others claiming under him.

Upon principle, and by the weight of decided cases, we think there was no error at the trial in the present case in this respect. *Clark* v. *Morrison*, 25 Penn. State, 453. *Titlow* v. *Titlow*, 54 Penn. State, 222. *Osgood* v. *Manhattan Co.* 3 Cowen, 612. *Dan* v. *Brown*, 4 Cowen, 492. *Hauberger* v. *Root*, 6 W. & S. 431. *Thompson* v. *Thompson*, 13 Ohio State, 358. *Blakey* v. *Blakey*, 33 Alab. 616.

The conduct of Shailer and Hayden in relation to the property and business of the testatrix stands on the same footing with their admissions. It had no legal tendency to establish the issue on the part of the contestants. The act could not be invalidated, so far as others at least were concerned, by their subsequent conduct. The codicil of 1857, if freely and intelligently executed, would of itself fully establish the will of 1853. But the conduct of either in procuring it was clearly incompetent on these issues. All the other specific subsequent conduct offered seems to have consisted of independent and disconnected acts, not in any way related to the making of the will of 1853. Any subsequent acts of theirs, or of any one else, by which the testatrix was in any way prevented from revoking or making any change in her will if she desired, or by which her relatives and

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friends were prevented or debarred in any way from free access to and communication with her, were expressly allowed to be shown. The deed of 1857 to Hayden, the consideration for which was inquired of in his cross-examination, was properly excluded as not tending to contradict his testimony. The facts inquired of were not material to the issue, and were not open to contradiction. The auditing of Hayden's accounts by Shailer in 1855, her dissatisfaction with and continued employment of Hayden, proposed to be proved in cross-examination of Shailer, were circumstances too remote in point of time to have any bearing upon the mental *status* at the date of the will.

It was further objected that Hayden and Shailer were not competent witnesses under the statute. But this is not a case where one of the original parties to the contract or cause of action in issue and on trial is dead. They are not parties in a representative capacity. There was no cause of action in existence till the death of the testatrix. The controversy is between living parties. The testatrix is in no sense a party to the original cause of action. Her act was only the subject matter of the investigation. The rule contended for would exclude parties on both sides in all cases where litigation should arise, growing out of the act of another during life. We cannot construe the proviso of the statute so as to exclude as witnesses all those who may be parties on one side or the other in all probate appeals like this; and we find no error in the ruling. Gen. Sts. *c.* 131, § 14. *Baxter* v. *Knowles*, 12 Allen, 114.

Facts showing the mental and moral condition of the testatrix in July 1854, and at various periods subsequent to that time, were offered, and excluded as being too long after the date of the will. To a great extent, it must be left to the presiding judge to determine upon the facts before him how far evidence of this description may have a tendency to throw light on the fact to be found, namely, the actual condition at the date of the will. Some limit must of course be had in applying practically the rules which govern the admission of this evidence. We do not perceive any reason to differ from the judge in the limit here applied. After July 1854 her mental condition must have

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greatly changed. Her advanced age and the paralysis with which she was at that time seized seem to make that period a proper limit for the evidence offered; and we see no reason for sustaining this exception.

In regard to the offer to show that several of the family of the testatrix had been, in advanced age, affected by paralysis, accompanied by an enfeebling of the mental and moral powers, and that it was a family tendency, we are of opinion that no sufficient foundation was laid for the admission of such evidence. In questions of sanity, proof of hereditary tendency is competent in support of evidence of the existence of insanity in any given case. Here the sanity of the testatrix is not to be called in question. Her complaints of numbness in 1851, her physical weakness and mental inactivity prior to the attack of paralysis in 1854, do not justify the admission of the proof offered of hereditary tendency. No case is cited in which such evidence has been admitted in aid of the proof showing mere weakness of mind or eccentricity. 1 Redfield on Wills, 156, 157. *Baxter* v. *Abbott*, 7 Gray, 75.

The only remaining point arises upon the manner in which the issues as framed were submitted to the jury by the presiding judge. It is claimed to be the duty of this court now to revise the order, upon exceptions or appeal taken in the usual way. In the matter of framing issues, proceedings in probate appeals are conducted in accordance with the rules and practice in equity. The findings of the jury in such cases are availed of to inform the court in matters of controverted facts which may become material in settling the final decree. They may be disregarded, in whole or in part, if on the final hearing they are not deemed important or relevant; or such new issues may from time to time be framed and submitted as a just regard to the rights of all may seem to require.

Three testamentary papers were here produced, purporting to have been executed in three different years. The like four issues were presented as to each. The court, having regard to the fact alleged, that the mental capacity of the testatrix had been seriously affected by severe illness between the years last named,

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ordered the issues tried separately; and those relating to the will of 1853 have been accordingly twice tried. Two of the issues at the first and two at the last trial were found in favor of the will. We cannot see that any injustice has been or is likely to be done by submitting the issues in this way to the jury; or that the trial of the issues upon the will of 1853 ought not now to be completed.

The exceptions having been sustained in the single respect above stated, the last verdict of the jury upon the issues relating to the will of 1853 is therefore set aside, and a new trial ordered upon the second and third issues relating to that will.

LEVI H. MARSH & another *vs.* PETER RENTON & others.

A testator gave to trustees property variously invested, "to be disposed of for the benefit of the poor in the manner hereinafter provided;" and directed the trustees and their successors to appoint a committee of three or more gentlemen who should "determine how, by the payments to permanently established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect," and to dispose of and pay over the trust fund "in accordance with the determination of the said gentlemen certified by them to the trustees." The trustees selected the committee, who determined that certain sums expressed in money should be paid to various corporations of the kind described, and that if the trust fund should exceed the aggregate of these sums "the residue is to be subject of future disposal by us." Some years afterwards elapsed before the trustees became able to reduce the fund to money and pay it over; the residue of the fund at the time of the determination of the committee was more than the aggregate sum which they apportioned; and during the interval the income of the fund accumulated at a rate greater than the legal rate of interest, and one of the committee died. *Held*, that the corporations designated were not entitled to take the income of any specific part of the fund, nor shares of the whole income proportioned to the sums designated to be paid to them: but to receive the amount of legal interest on such sums from the time of the report of the committee; and that any surplus of the income, after payment of such interest, should be added to the fund for further distribution. *Held, also*, that the vacancy on the committee could be filled by appointment by the trustees; and that no further distribution of the fund could be made until after the filling of such vacancy. *Held, further*, that in such further distribution the committee might designate payments to institutions of the kind described in the will incorporated since the creation of the trust.

BILL IN EQUITY by trustees under the will of Mrs. Abigail Loring to obtain instructions relating to the disposal of the trust

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fund. The facts were agreed, and those which are material were as follows:

Mrs. Loring by her will gave the residue of her estate to the plaintiff Marsh and Samuel E. Guild, as trustees, to "be disposed of for the benefit of the poor, in the manner hereinafter provided: It is my will that when" "the trust fund is to be disposed of as aforesaid, the said Marsh and Guild, or their successors as trustees, shall select and appoint three or more gentlemen, who shall be informed of the facts by the trustees, and shall determine how, by the payments to permanently established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect and my gift may be made most productive of benefit to the poor; and that thereupon the said trust fund" "shall be disposed of and paid over, in accordance with the determination of the said gentlemen, certified by them in writing to the trustees."

On the decease of the testatrix, Mr. Guild having died previously, Mr. Marsh was appointed sole executor and trustee, and, in execution of the trust, he selected a committee of three gentlemen to determine how the fund should be distributed; and they directed $171,000 to be paid, in various sums, to the Massachusetts General Hospital and numerous other charitable institutions. The fund being in various kinds of property, its exact cash value could not be determined until it should be converted into money; and therefore the committee provided in their certificate, which was dated December 20, 1863, that "if it should exceed the aggregate of $171,000 in any amount not beyond $5000, we appoint such excess to be paid to the Massachusetts General Hospital for the purchase of free beds; and if the excess should exceed $5000, the residue is to be subject of future disposal by us."

The trustee was about to sell the property and distribute the proceeds, when a claim was preferred against the fund in his hands, by the heirs at law of Mrs. Loring and by the administrator of one of her children, which ultimately became the subject of a suit in the courts of the United States, prosecuted on the ground that the devise for the benefit of the poor was void,

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and that the powers given to two trustees could not be executed by one. The trustee filed this bill against said claimants and the charitable institutions; and while it was pending the suit above referred to was commenced, and the validity of the will and the devise to charities were established by a final decree in the supreme court of the United States [*Lorings* v. *Marsh*, 6 Wallace, 337]; whereupon this bill was, by consent, dismissed as to all the defendants except the charitable institutions.

During the interval caused by this litigation, the fund was increased by accumulations of income largely more than it would have been if the property had been sold and the proceeds put on interest; and, so far as can be determined, the residue of the fund at the time when the apportionment was made by the committee did exceed $5000.

During the interval, also, one member of the committee died; and a co-trustee with Mr. Marsh was appointed and joined with him as a plaintiff.

The matters on which the trustees finally asked the instructions of the court were as follows: 1. Are the charitable institutions entitled to their respective proportions of the income of the $171,000 directed to be paid to them? 2. If not, are they entitled to interest on the sums directed to be paid to them from the time of the appointment, or any other time? 3. If not, what disposition shall be made of said income? 4. Can the surviving members of the committee direct how the surplus fund shall be distributed? 5. If not, and a new member should be appointed, by whom should he be selected and appointed?

The case was reserved by *Gray*, J., on these facts, for the determination of the full court; and at the argument instructions were asked on the further question, Whether in executing this charitable trust institutions organized as corporations since the creation of the trust may be selected as recipients of any portion of the fund?

C. W. Loring, for the plaintiffs.

F. C. Loring, for the defendants.

Wells, J. The will authorized the distribution of the trust fund in such mode as the committee of gentlemen, to be se-

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lected, should determine. They appointed definite sums to be paid to each institution named by them as recipients; with a provision as to any residue that might be found to exist. This appointment did not vest in those institutions an interest in any portion of the fund specifically; and, although the intention was to distribute the entire fund, the provision as to the surplus shows conclusively that the amount assigned to each institution did not represent a proportionate share of the whole. It is therefore impossible to say that the several institutions are entitled to take the income of any specific part of the fund; or to take a share of the whole income proportioned to the amount of the principal designated to be paid them. They are entitled to the usual allowance of interest from the time the legacy became payable; namely, from the return of the report of the committee. If the income had been less than six per cent., they would not have been obliged to abate any part of their claim for full interest, unless the whole fund had proved insufficient to pay it. It is not the case of an executor or trustee neglecting to set apart a fund, contrary to his duty, and taking to himself the advantage of the greater income. In such a case, he might be charged with a trust, in favor of the party whose fund he had withheld and used, for the full amount of income received. Here, he is chargeable simply as trustee of the whole fund, under the will; and is in no fault for the retention and delay in the separation of the several interests therein. He must indeed account for the whole income; but he is to do so only as the general trustee under the will; and the benefit from an income greater than interest will accrue, as would the loss if it had been less, to the surplus. This disposes of three of the questions submitted to us.

The fourth and fifth relate to the appointment of one to fill the place of a member of the committee who has died since the first report. The will contemplates the concurrent action of three or more gentlemen. We are of opinion that no further distribution can be made until the vacancy is filled; and that it can only be filled by the selection and appointment of the trustees acting under the will.

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Another question has been discussed before us, and instructions asked thereon; namely, Whether, in executing this charitable trust, institutions organized as corporations since the creation of the trust may be selected as recipients of any portion of the fund? As the bequest was not made for the benefit of any particular institution, and as they are to be selected merely as means or instruments to carry out the charitable purposes of the testatrix, we can have no doubt that payments may be directed to be made to any institution, which, at the time of such appointment, comes within the description of a "permanently established and incorporated charitable institution." *Instructions accordingly.*

JONATHAN I. BOWDITCH & others *vs.* COUNT HENRI SOLTYK & others.

A will proved in Massachusetts, where the testator had his domicil, directed trustees of his estate "to raise the sum of one hundred and fifty thousand francs, money of France, and to apply the same to the fulfilment of a certain marriage contract," made at Geneva in Switzerland, in which the testator, the father of the future wife, agreed to pay to her an annuity of six thousand francs, money of France, to cease at his death and "be then converted into a capital of one hundred and fifty thousand francs, which should "only be handed over to the future wife or to her children against a sufficient mortgage, or any other equivalent guaranty, to be given by the future husband." After the death of the testator, the husband executed an instrument at Vienna in Austria, renouncing all right in this fund, and declaring it unnecessary for him to give security for a sum which he never received. Subsequently, at Cracow in Austria, where the husband and wife had their domicil at the time, an ecclesiastical court granted to her a decree of divorce from bed and board for life, for his criminal conduct, reserving to her and to their son "all the rights of property which according to the law of the land belong to an innocent wife and the children," and declaring that, "notwithstanding the decree of divorce for life, she remains at liberty to consent to live together with her husband in case he should bring sincere proofs" of reformation. By the law of Geneva and of Austria, a payment of the fund to her, without due security for its proper investment according to the marriage contract, would not discharge the trustees from responsibility, notwithstanding the release of the husband and the divorce. *Held*, that the amount to be raised from the estate for the fund was such a sum, computed in treasury notes of the United States, as would purchase a hundred and fifty thousand francs deliverable here; and that the trustees should continue to hold the fund in trust for the benefit of the wife, until the further order of the court, with liberty to apply for further instructions in event of the death of her, or of her husband, or other change of circumstances.

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Bowditch & others v. Soltyk & others.

The costs of a bill in equity brought by executors and trustees to obtain the instruction of the court as to the construction of a bequest are to be borne by the residuary assets.

GRAY, J. This is a bill in equity by the executors and trustees under the will of Edward V. Childe, of Boston, to obtain the directions of the court as to the construction and effect of the first clause in his will, by which he directs them "to raise the sum of one hundred and fifty thousand francs, money of France, and to apply the same to the fulfilment of a certain marriage contract," made in 1853 at Geneva in Switzerland between his daughter and Count Soltyk of Poland, and signed by them and also by Mr. Childe and his wife.

The original marriage contract has not been submitted to us. But, according to a translation which the parties have agreed to be correct, its material articles are as follows: "The future couple declare that their intention is to marry under the *regime dotal*." Mr. Childe assigns and promises to pay to his daughter, and, in case of her dying before him leaving children, to her children, until his death, an annuity of six thousand francs, money of France. "At the decease of the said Mr. Childe, the said annuity will cease, and will be then converted into a capital of one hundred and fifty thousand francs, which will only be due and demandable in case the future wife, or children issued from the present marriage, should survive the said Mr. Childe. The said capital will only be handed over to the future wife or to her children against a sufficient mortgage, or any other equivalent guaranty, to be given by the future husband."

In 1862, after the death of the testator, Count Soltyk, by an instrument in writing executed at Vienna, declared that it was unnecessary for him to give a mortgage or other guaranty for a sum which never came into his hands, and renounced all right in the principal or interest of the sum of one hundred and fifty thousand francs. In 1866, an ecclesiastical court in Cracow in Austrian Poland, where the husband and wife then had their domicil, granted to her, for her husband's adultery, desertion and squandering his inherited property in gambling, a decree of divorce from bed and board for life, with the right to educate

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their son, (who is still living,) and reserving to her and to him "all the rights of property which according to the law of the land belong to an innocent wife and the children," yet declaring that, "notwithstanding the decree of divorce for life, she remains at liberty to consent to live together with her husband in case the same should bring sincere proofs that he on his part will forever remove the causes on the strength of which this divorce from bed and board has been granted; all of which in the spirit of the sanctity of the matrimonial sacrament is very desirable, and for both man and wife would carry with it the blessing of God."

The wife has appeared and submitted to the jurisdiction of this court; and notice has been given to the husband, and the bill taken for confessed against him, in accordance with the rules of court and the ordinary practice in chancery. The will has been proved in Massachusetts, the trust property is here, the plaintiffs reside here and derive their rights as executors and trustees to hold the property from the courts of this state, and are accountable to those courts for the due performance of their trusts, and one of them is sole residuary legatee of all the property not bequeathed to Countess Soltyk. There can be no doubt, therefore, of the jurisdiction of this court to entertain the bill and to make a decree which will bind all the parties to the suit. *Chase* v. *Chase*, 2 Allen, 101. *Martinius* v. *Helmuth*, Coop. 245.

The interpretation and effect of the clauses in the marriage contract, by which the parties declare their intention to marry under the *regime dotal*, and the delivery of the principal fund is made conditional upon the husband's giving "a sufficient mortgage or other equivalent guaranty," depend upon the foreign law, of which this court has no judicial knowledge except from the evidence in the cause. *Talbot* v. *Seeman*, 1 Cranch, 38. *Di Sora* v. *Phillipps*, 10 H. L. Cas. 624. *Knapp* v. *Abell*, 10 Allen, 488. The only evidence which has been submitted is the testimony of competent foreign jurists, who are clearly of opinion that by the law of Geneva, of France, and of Austria, the effect of the contract is to secure the investment of the wife's dowry in

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a peculiar manner for her benefit, to hold the husband to his legal responsibility for it to her and her heirs, and to make it inalienable during the marriage, even with the concurrence of both husband and wife, except to endow her children, or by leave of court for special purposes; that the income may be received by the husband so long as they live together, and by the wife in case of legal separation, and the wife may dispose of the principal by will, as if unmarried, within the limits allowed by the law of her domicil, or after his death by deed; and that an unconditional payment of the principal sum to the wife, or without due security for its proper investment according to the marriage contract, will not discharge Mr. Childe's executors or representatives from responsibility, notwithstanding the husband's release, the decree of divorce, and the fact that by the Austrian law generally a married woman has power to dispose of her own property. The decree of divorce is from bed and board only, and permits and indeed advises the parties to come together again. To order the fund to be paid unconditionally to the wife would be in direct opposition to the terms, as well as the effect, of the marriage contract, and, in case the parties should hereafter live together, would expose the property to all the risks which the contract was carefully framed to guard against. The fund cannot therefore be ordered to be paid to the wife, but must be held in trust by the plaintiffs or their successors, for her benefit, and the annual income paid to her until the court shall otherwise order, with liberty to apply for further directions, in case of the death of herself or her husband, or other change of circumstances. Her right to dispose of the fund by will or otherwise cannot properly be passed upon by the court now, in anticipation of any actual question, and without the opportunity of hearing all parties interested. *Otis* v. *Coffin*, 7 Gray, 514. *Cross* v. *De Valle*, 1 Wallace, 15.

The question remains, What amount of money is to be set apart as constituting this fund? As the court does not order the fund to be paid to Countess Soltyk absolutely, the agreement made between her and her brother, one of the plaintiffs, as to the sum at which it should be estimated in that event, does not apply.

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The testator's domicil was here; his estate is to be settled here; and there is no direction in the will that the sum shall be paid in any other country. It is therefore to be paid here, and no question of exchange or expense of remittance arises. The amount to be set apart is such a sum in money of the United States as will produce one hundred and fifty thousand francs in Boston. *Cockerell* v. *Barber*, 16 Ves. 461. *Campbell* v. *Graham*, 1 Russ. & Myl. 461. *Otis* v. *Coffin*, 7 Gray, 513. Story Confl. Laws, § 313. In *Stewart* v. *Chambers*, 2 Sandf. Ch. 382, cited at the bar, the will expressly directed the legacy to be paid in a foreign country. See also *Blanchard* v. *Equitable Safety Insurance Co.* 12 Allen, 390.

The more difficult question is, By what rule is the amount of dollars to be ascertained, in the present state of the currency of this country? This question is not affected by the decision in *Otis* v. *Coffin*, 7 Gray, 511, for two reasons; because in 1856, when that case was decided, as well as in 1839, when Admiral Coffin made his will and died, there was no lawful tender for the payment of debts here, except gold and silver coin; and because English and French coins were then current here by law as money. U. S. Sts. 1843, *c.* 69; 1834, *c.* 96; 5 U. S. Sts. at Large, 607; 4 Ib. 700. But now no foreign money is a lawful tender in the United States, although the value of French, English, and some other foreign coins for certain mercantile purposes is regulated by law in the absence of agreement. U. S. St. 1857, *c.* 56; 11 U. S. Sts. at Large, 163. *Commonwealth* v. *Haupt*, 10 Allen, 43, 47. *Stanwood* v. *Flagg*, 98 Mass. 124. According to recent decisions of this court, even coined money of the United States may under some circumstances be estimated, in making up a judgment, at its market value in treasury notes of the United States. *Sears* v. *Dewing*, 14 Allen, 413. *Cushing* v. *Wells, Fargo & Co.* 98 Mass. 550. This is not a case of compelling performance of a mere contract for the payment of a sum of money, but of ascertaining and carrying out the intention of a testator as to the distribution of his estate between his children — less a case of debt than of trust. French francs are money in France and Switzerland; they are but a

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commodity here. The testator in effect directs so much money to be taken out of his estate as will purchase one hundred and fifty thousand francs delivered in Boston. If the francs are purchased with gold coin, it will require a smaller sum; if with treasury notes, a greater sum. To estimate the sum to be set apart in gold, and then allow it to be set apart in paper, nominally equivalent, but commercially of inferior value, and which would not in fact produce the required amount of francs here, would defeat the manifest intention, if not the express words, of the will. The court is therefore of opinion that the amount to be invested here for the benefit of Countess Soltyk is such an amount in treasury notes of the United States as will purchase in Boston the sum of one hundred and fifty thousand francs delivered here.

The costs of all parties in this suit, properly brought to clear up an ambiguity in the language of the will, and to enable the plaintiffs to execute their trust, must, like the ordinary expenses of administration, be borne by the residuary assets. *Sawyer* v. *Baldwin*, 20 Pick. 388, 389, and cases cited. *Rogers* v. *Ross*, 4 Johns. Ch. 608. 2 Dan. Ch. Pract. (3d Am. ed.) 1503, 1506.

Decree accordingly.

S. Bartlett, for the plaintiffs.

W. Minot, Jr., & F. V. Balch, for Countess Soltyk.

Waldo Flint *vs.* Board of Aldermen of the City of Boston.

It is within the constitutional powers of Congress to establish a national bank in any state, and provide that the shares of its capital stock shall be exempt from taxation by other states.

The U. S. St. of 1864, c. 106, § 41, makes unlawful the imposing by, or by the authority of, a state, of a tax on shares owned by an inhabitant thereof in the capital stock of a national banking association organized under that statute, and located in another state.

Petition for a writ of *certiorari* to the aldermen of Boston, to reverse their refusal, on appeal from the assessors of Boston,

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to abate a tax assessed in 1867, under the laws of the Commonwealth, St. 1865, *c.* 242, on forty shares owned by the petitioner, who resided in Boston, in the capital stock of the American Exchange National Bank, a national banking association organized under the U. S. St. of 1864, *c.* 106, and located in the city and state of New York; the amount of which tax the petitioner, after such refusal, paid under protest; all which was alleged in the petition. The answer admitted the facts alleged; and justified the refusal of the respondents on the ground of the legality of the assessment. The case was reserved by the chief justice, on the petition and answer, for the determination of the full court.

C. H. Hill, (*J. P. Healy* with him,) for the respondents, was first called upon. The restriction in the U. S. St. of 1864, *c.* 106, § 41,* on the right of the several states to tax the interest of their own citizens as stockholders in national banks established in other states, transcends the powers of Congress, and is therefore inoperative and void.

1. The states, as necessarily inherent to the sovereign nature of their government, possess, as between themselves and the federal government, a concurrent right of taxation extending to all persons and property within their borders, excepting so far as they are restricted by the Constitution of the United States. The only restrictions expressly imposed by the Con-

* The material portion of the U. S. St. of 1864, *c.* 106, § 41, is as follows:

"Provided, that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: Provided, further, that the tax so imposed under the laws of any state upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located: Provided, also, that nothing in this act shall exempt the real estate of associations from either state, county or municipal taxes to the same extent, according to its value, as other real estate is taxed."

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stitution are in regard to exports and imports. The restrictions which have been held to be by necessary implication likewise imposed by the Constitution are as to the taxation of the property and instruments of government of the United States, and of the national securities. Const. of U. S., art. 1, § 10. *McCulloch* v. *Maryland*, 4 Wheat. 316, 425, 429, 430. *Osborn* v. *United States Bank*, 9 Wheat. 738. *Weston* v. *City Council of Charleston*, 2 Pet. 449. *Providence Bank* v. *Billings*, 4 Pet. 563. Federalist, No. 32. 1 Kent Com. (6th ed.) 391 *et seq.* The restriction on state taxation arising from the national banks being instruments of government was distinctly stated by Chief Justice Marshall, in 4 Wheat. 436, not to extend to the capital stock in the hands of shareholders. The scope and purpose of that decision, according to Chancellor Kent, was "to define and settle the bounds of the restriction of the power of taxation in the states, and especially when that restriction was deduced from the implied powers of the general government;" and the highest authorities concede the inherent right of the states to tax the shares in national banks in the hands of their own citizens. 1 Kent Com. 425, 427. *Berney* v. *Tax Collector*, 2 Bailey, 654. *Utica* v. *Churchill*, 33 N. Y. 233, 234. *State* v. *Hart*, 2 Vroom, 436, 437. *Commonwealth* v. *Hamilton Manufacturing Co.* 12 Allen, 298, and 6 Wallace, 632. Speeches of Senators Fessenden and Collamer, 64 Congr. Globe, 1895, 1899. See also *Van Allen* v. *Assessors*, 3 Wallace, 573; *People* v. *Commissioners*, 4 Wallace, 244; *Austin* v. *Aldermen of Boston*, 14 Allen, 359. The distinction made in these cases between the interest of the shareholder in the capital stock of a corporation, and the corporation itself, defines the proper bounds of the constitutional restriction on state taxation of the instruments of government and the national securities. If this be not the limit of the restriction, where is that limit to be found? Otherwise congress may declare that the buildings occupied by the banks shall be exempt from taxation; that the salaries of their officers shall enjoy the same privilege; and that income derived from shares, and profits made by dealing in shares, shall likewise bear no part of the state burdens; for all these in remote degrees affect

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the bank and the national securities forming the corporate capital. But the restriction on the powers of taxation in the states is a matter of constitutional and not of legislative provision; and congress has no power to extend it beyond the express and necessarily implied prohibitions of the Constitution. *People* v. *Hoffman*, 37 N. Y. 9.

2. The fact that the bank in the present case is established in another state does not affect the question. The shares are personal property; and it is a universal principle of jurisprudence that personal property follows the domicil of the owner, and is subject to the laws of the country where he resides. Story Confl. Laws, §§ 376, 380, and authorities collected in note. 2 Kent Com. 428 *et seq.* The effect, therefore, of the proviso in § 41 of the U. S. St. of 1864 is to deprive the Commonwealth of the right to tax, in the hands of its own citizens, choses in action in the shape of shares in a corporation, although the law makes them subject to its jurisdiction, and although the tax is not one prohibited expressly or impliedly by the Constitution of the United States. Whence does congress derive the power to do this?

3. It is admitted that congress may prevent its creature from being destroyed by over-taxation, even of its stock in individual hands; but this power is satisfied by the provision that the rate of taxation shall not exceed that imposed on other moneyed capital by the state; which was the subject of the decision in *Van Allen* v. *Assessors*, 3 Wallace, 573; and certainly does not carry with it such a function as must exist to justify this enactment. See *Austin* v. *Aldermen of Boston*, 14 Allen, 365.

4. Another argument which may be urged in behalf of the existence of a power to impose this condition is, that otherwise the shares may be subjected to double taxation. But the obvious answer is, that this is the natural result of a man's investing personal property in other states or countries. He and his property thereby receive the protection of different governments, and should be taxed for the support of each. Such taxation is not hostile or discriminating, and is the same to which other moneyed capital is subjected under like circumstances. This

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distinguishes this case from that of *Van Allen* v. *Assessors*, above cited.

5. But even if congress could withhold altogether the right to tax these shares, the conditions imposed by this statute are a direct interference with our mode or system of taxation. In *Austin* v. *Aldermen of Boston*, 14 Allen, 365, the court threw out a strong intimation of opinion that congress cannot impose conditions affecting the manner of taxation in a state, even when granting a new right of taxation. This whole proviso is framed in accordance with the system of taxation existing in some states, and applied indiscriminately to all, and for this reason is an interference with the sovereign powers and internal government of the states, wholly unauthorized by the Federal Constitution. See also *Wetherbee* v. *Johnson*, 14 Mass. 412.

C. B. Goodrich & I. J. Austin, for the petitioner, were stopped by the court.

Hoar, J. The petitioner is a resident of the city of Boston, and has been assessed in that city upon the shares owned by him in a national banking association located in the city of New York. We think the case must be governed by the principles stated in the decision in *Austin* v. *Aldermen of Boston*, 14 Allen, 359. The national banks are artificial bodies created by the laws of the United States. The power of congress to establish them arises from their being suitable instruments for the performance of functions pertaining to the national government. As such instruments, they are not subject to taxation under state authority. And although the shares in their capital stock are so far distinct from the corporations themselves as to be the subject of state taxation, if such taxation is not restricted or prohibited by congress, yet it has been expressly decided by the supreme court of the United States that they are "a subject matter over which congress and the states may exercise a concurrent power, but from the exercise of which congress, by reason of its paramount authority, may exclude the states." *Van Allen* v. *Assessors*, 3 Wallace, 573. In that case it was held that a tax on shares in national banks was invalid, which was not

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levied in conformity with the stipulations in the proviso of the U. S. St. of 1864, *c.* 106, § 41.

By the construction which was given to that proviso by this court in *Austin* v. *Aldermen of Boston*, congress has thereby prohibited the assessment of taxes by any state upon the shares of a national bank established in any other state. The purpose may have been to attract banking capital, and induce the formation of national banks within those states where the rate of taxation is low. But whatever may have been the design or motive, we can have no doubt that it is within the constitutional power of congress to establish a national bank in any state, and to provide that its shares shall have such a local nature as to be exempt from taxation by other states; and that this power has been exercised in the present instance. *Abbott* v. *Bangor*, 54 Maine, 540. *Certiorari to issue.*

MANUFACTURERS' INSURANCE COMPANY *vs.* JACOB H. LOUD, Treasurer and Receiver-general of the Commonwealth, & another.

The tax imposed by the St. of 1865, *c.* 283, on corporations chartered by the Commonwealth or organized under the general laws for purposes of business or profit, having a capital stock divided into shares, is a tax on their franchises, and not on their property; and it is no reason for abatement of any portion of such a tax, that, in computing the market value of the capital stock of the corporation as the true value of its corporate franchise, the tax commissioner omits to make any deduction for a portion of its property invested in bonds of the United States which are exempt from taxation by any state.

PETITION on the St. of 1867, *c.* 52, § 2, for abatement of a portion of a tax assessed under the St. of 1865, *c.* 283, upon the petitioners, a corporation chartered by this Commonwealth for purposes of business as insurers of fire and marine risks, and having a capital stock divided into shares.

The only issue was, whether, in ascertaining the true value of the corporate franchise of the petitioners by computing the market value of the shares of their capital stock on May 1, 1866, the tax commissioner was in error in making no deduction on account of a portion of their property which was invested in bonds of

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the United States exempt from taxation by state authority; and it was agreed that on May 1, 1866, the petitioners owned such bonds of the par value of $180,000, and of the market value of $242,438, and made return thereof and of their other property on that day to the tax commissioner, on the basis of which return the valuation was made on which the tax was assessed, which they paid under protest after the refusal of the board of appeal to make correction thereof. This question was reserved by *Wells*, J., for determination by the full court.

C. W. Storey & N. St. J. Green, for the petitioners.

C. Allen, Attorney General, *& J. C. Davis*, for the respondents.

WELLS, J. It has been repeatedly held by this court that the tax upon a corporation under the St. of 1864, *c.* 208, was a tax upon the franchises of the corporation, and not upon its property. In the St. of 1865, *c.* 283, the intention of the legislature to lay the tax upon the corporate franchises appears even more obviously than in the St. of 1864. The petitioner does not point out any feature of the St. of 1865 which may operate to control that apparent intent, and give the statute the effect of imposing a property tax.

It is agreed that the computations and all the proceedings in levying the tax are correct and in conformity with the statute, unless the omission to make a deduction from the market value of the capital stock on account of the bonds of the United States held by the corporation shall be adjudged to be erroneous. But, as the aggregate valuation, upon which the tax is computed, is not a valuation of the property of the corporation, it does not include, as a component part of itself, the value of the bonds as property. No deduction of the value of such bonds is required, therefore, in order to arrive at the basis of the taxation contemplated by the statute; nor by reason of their specific exemption from taxation by the Constitution and laws of the United States. No part of the tax is assessed upon the property of the corporation in these bonds, nor upon their property however held or invested. *Petition dismissed.*

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The Attorney General *vs.* Bay State Mining Company.

The tax of a certain percentage of the par of its capital stock, imposed by the St. of 1865, *c.* 283, § 8, on every company or association "having an office or place of business within this Commonwealth for the direction of its affairs or transfer of shares," and "incorporated elsewhere" "for the purpose of engaging without the limits of the Commonwealth in the business of coal mining or other mining, quarrying, or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling or holding mines or lands without the Commonwealth," is warranted by the Constitution of the Commonwealth, and is not in conflict with the Constitution of the United States; nor was said § 8 in any respect repealed or annulled by the St. of 1866, *c.* 291.

Information filed December 13, 1867, on the St. of 1865, *c.* 283, § 14, at the relation of the treasurer and receiver-general of the Commonwealth, seeking a decree for payment by the defendants, a corporation organized under the law of Michigan for the purpose of engaging in the business of mining copper in that state, of taxes in 1866 and 1867, under the St. of 1865, *c.* 283, § 8, the material part of which is printed in the margin;* and for an injunction against further prosecution of business in the Commonwealth by the defendants, until the same should be paid with interest.

The information alleged the maintenance by the defendant corporation of an office or place of business, namely, the office of its treasurer, in Boston, for the direction of its affairs and transfer of shares; and the making of returns by its treasurer to

* "Every corporation chartered by this Commonwealth, or organized under the general laws, for the purpose of engaging, without the limits of the Commonwealth, in the business of coal mining or other mining, quarrying or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling, or holding mines or lands without the Commonwealth, and every such company or association, incorporated elsewhere, and having an office or place of business within the Commonwealth for the direction of its affairs or transfer of shares, shall, semiannually, between the first and the tenth day of June and December, make a return, under the oath of its treasurer, or president, to the tax commissioner, of the whole amount of its capital stock, as fixed by the corporation, on the first day respectively of May and November next preceding, and pay to the treasurer of the Commonwealth a tax of one twentieth of one per cent. upon said capital stock at the par thereof."

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the tax commissioner in June and December 1866, and June 1867, in conformity with the statute; that in truth and fact the par value of its capital stock as fixed on May 1 and November 1, 1866, and May 1, 1867, was as thus returned; and that "by reason thereof said corporation became liable and was bound to pay to the treasurer of the Commonwealth" the taxes alleged, being one twentieth of such par value at the three dates last named.

The answer substantially admitted the facts alleged in the information; but denied "that said corporation owes the taxes mentioned in said information to said Commonwealth and interest thereon, or any part of said taxes and interest, or is or was liable and bound to pay to the treasurer of said Commonwealth said taxes;" alleged that the defendant corporation "is a foreign corporation owning real estate in the state of Michigan, and employing its capital stock in the working of a mine in said state, that said capital stock is owned in part by citizens of states other than the state of Massachusetts, that nearly all the contracts for labor at said company's mine and for materials purchased for use at said mine are entered into in Michigan, and drafts for the payment of the same, drawn by the agent of the company at the mine on the treasurer of the company residing in Boston, are delivered to and received by the laborers, and parties furnishing materials, as payment;" further denied "that said Commonwealth has the right or power, under the Constitution of the United States, or under the Constitution of said Commonwealth, to tax said corporation, said corporation being a foreign corporation and receiving all its corporate powers and privileges from the state of Michigan;" and finally alleged "that the provisions of said St. of 1865, *c.* 283, so far as it is pretended that the same are applicable to said defendants in requiring the payment of a tax to the treasurer of said Commonwealth are repealed by the provisions of the St. of 1866, *c.* 291."

The case was reserved by *Foster*, J., on the information and answer, for determination by the full court.

C. Allen, Attorney General, *& J. C. Davis*, for the Commonwealth, besides cases cited for the defendants and in the opin-

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ion, cited *Tremont Bank* v. *Boston*, 1 Cush. 145; Angell & Ames on Corporations, § 486 *a*; *De Groot* v. *Van Duzer*, 20 Wend. 390; *Bank of Augusta* v. *Earle*, 13 Pet. 589; *Corfield* v. *Coryell*, 4 Wash. C. C. 380; *Blackstone Manufacturing Co.* v. *Blackstone*, 13 Gray, 488; *McCulloch* v. *Maryland*, 4 Wheat. 429; *Providence Bank* v. *Billings*, 4 Pet. 564; *Nathan* v. *Louisiana*, 8 How. 82; *Biddle* v. *Commonwealth*, 13 S. & R. 409; *Commonwealth* v. *Milton*, 12 B. Monr. 212; *Fire Department* v. *Noble*, 3 E. D. Smith, 440; *Fire Department* v. *Wright*, Ib. 453; *State* v. *Delaware, Lackawanna & Western Railroad Co.* 1 Vroom, 473.

J. G. Jackson, for the defendants. 1. The Commonwealth has no authority to tax the capital stock of a foreign corporation. The legislature has power to impose "proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident and estates lying within the Commonwealth;" and also to impose "reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the same." Const. of Mass. part 2, *c.* 1, § 1, art. 4. But this gives no authority to impose taxes on property or persons not subject to their jurisdiction. The capital stock, as such, of the defendant corporation, is beyond its jurisdiction.

In *Portland Bank* v. *Apthorp*, 12 Mass. 252, and *Commonwealth* v. *Hamilton Manufacturing Co.* 12 Allen, 298, the defendants being domestic corporations, it was held that under the term "commodity" their charters were included, and that the legislature, which created and sold these commodities, might, as the price of the commodity, in the one case levy an excise or duty each year on the franchise of the bank, measured by the capital stock which it permitted the bank to hold, and in the other case measure the value of the commodity sold by the market value of the shares. But in the case at bar, though the legislature may compel the defendant corporation to pay a license for maintaining an office for the transaction of part of its business in Massachusetts, yet, having no control over the charter, it cannot levy a tax on the capital stock, all of which is

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employed in another state. Massachusetts does not grant the defendants' franchise; and so cannot tax it. The principle, that a state, in order to tax a corporation on its franchise, must have granted the charter, or have the corporate property within its limits, seems to be expressly recognized by the St. of 1864, *c.* 208, §§ 6, 9, and by the very St. of 1865, *c.* 283, §§ 5, 7, relating to railroad and telegraph companies extending beyond the limits of Massachusetts or incorporated by other states. See also *Easton Bridge* v. *The County*, 9 Barr, 415.

The real and personal estate of the corporation may be taxed to the corporation by any power within whose jurisdiction it may be found; and the interest of the shareholders is personal to them, and may be taxed to them in their places of domicil, whether the shares so held by them are shares of foreign or domestic corporations, and notwithstanding, in the case of foreign corporations, that such corporations have paid taxes on their franchises and corporate property to the power which created them. *Gordon* v. *Appeal Tax Court*, 3 How. 133. Angell & Ames on Corporations, § 458. *Dwight* v. *Mayor & Aldermen of Boston*, 12 Allen, 316. *Commonwealth* v. *Berkshire Insurance Co.* 98 Mass. 25. But if Massachusetts has jurisdiction for taxation over such of the shares in this Michigan corporation as are held by citizens of Massachusetts, it does not follow that it has therefore such jurisdiction over all the shares of the capital stock of the corporation, part of which are owned by citizens of other states, and that it may so tax property in other states belonging to citizens of other states.

2. The St. of 1865, *c.* 283, on which this information is based, so far as applicable to the taxation of the capital stock of foreign mining corporations to such corporations, and not to the individual holders of shares in such stock, is repealed by the St. of 1866, *c.* 291, § 2, and the power to tax the shares in such corporations remitted to the towns and cities where the stockholders reside.

3. By the answer it appears that nearly all the contracts for labor at the mine in Michigan, and for materials purchased, are entered into in Michigan, and drafts for payments in fulfilment

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of these contracts are drawn on the treasurer of the company. The information asks the court to enforce the statute by enjoining the treasurer from paying these drafts; which would be in contravention of the Const. of the U. S., art. 1, § 10, forbidding any state from passing any law impairing the obligation of contracts.

Wells, J. The defence in this suit seems to rest upon the supposition that the existence and organization of the corporation, the functions and capacities with which it is endowed by the law creating it, are alone what constitute the franchise, or "commodity," which is the subject of the tax or excise imposed by the St. of 1865, *c.* 283. If it were so, there would be much force in the argument that, when these are derived exclusively from the authority of another state, they are not proper subjects of state taxation here.

But we think this is a too limited view of the matter. It is not merely the creation of corporate functions and privileges, or the conferring of rights and franchises by the legislature, which entitles the state to tax the possessor of such privileges and rights. The exercise of powers or privileges, and even of occupations without especial powers or privileges, may be equally subjected to such taxation, under the constitutional authority to "impose and levy reasonable duties and excises." It was so considered in the case of *Portland Bank* v. *Apthorp*, 12 Mass. 252; and the tax of one per cent., laid upon the capital stock of the bank, was justified upon principles equally applicable to individuals transacting similar business, and to brokers, factors, auctioneers, &c. The tax was not sustained on the ground that the corporation derived its existence from the state which imposed the tax; on the contrary, one principal question in that case was, whether, by the charter, the state had not conferred upon the bank the privilege of doing the business, for which it was created, without restriction, so as to exempt the corporation from the requisition of any tax or duty afterwards levied upon the exercise of that privilege.

That decision is sufficient for the present case. The tax is, indeed, in form, levied upon the capital stock of the corporation.

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But it is not merely the franchise of incorporation that is the basis of the tax; nor is it the capital, regarded merely as property. In case of domestic corporations, it is based upon a valuation which involves an estimate of all the advantages, present and prospective, which the stock is supposed to derive from the combination of capital and the exercise of all the rights and privileges enjoyed by the corporation in the conduct of its business. *Commonwealth* v. *Hamilton Manufacturing Co.* 12 Allen, 298.

When the exercise of corporate functions, authorized by the state, is extended beyond the limits of the state, as in railroads and telegraph lines, the tax is apportioned accordingly. In the case of mining companies whose mines are without the state, the tax is limited by the "par" of the stock; and the tax upon foreign companies is founded upon the express consideration of "having an office or place of business within the Commonwealth for the direction of its affairs or transfer of shares." A mining corporation which comes within the terms of this provision has its domicil of business within the Commonwealth, as completely as one that is organized under our General Statutes for the prosecution of a like enterprise. A corporation which seeks, by its agents, to establish a domicil of business in a state other than that of its creation, must take that domicil, as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there. The state may deny to foreign corporations the right to transact their business, hold property, or exercise any corporate function whatever within its limits. Or it may permit them to exercise such privileges upon terms prescribed by law, as has long been done in relation to insurance companies. *Erie Railway Co.* v. *New Jersey*, 2 Vroom, 531. The provisions of the statute in question are founded upon this right of exclusion or of conditional admission. Exclusion is the remedy provided to enforce compliance. The very defence to the suit implies the enjoyment of valuable rights and privileges within the Commonwealth, which a foreign corporation can only exercise by comity and the permission of the state.

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The court are all of opinion that the tax upon the defendant corporation is legal; that it is warranted by the Constitution of the Commonwealth, and is not in conflict with any provision of the Constitution of the United States; and that § 8 of the St. of 1865, *c.* 283, is in no respect repealed or annulled by the St. of 1866, *c.* 291.

The Commonwealth is therefore entitled to an injunction restraining the further prosecution of the business of the defendant corporation within the Commonwealth, excepting the payment of debts already contracted, until all taxes due under said act shall be paid with interest and costs.

ADA GOULD *vs.* BENJAMIN F. EMERSON.

A policy of life insurance, expressed, in accordance with the Gen. Sts. c. 58, § 62, to be for the benefit of the widow and child of the assured, cannot be affected by his will.

If a policy of life insurance, expressed to be for the benefit of the widow and child of the assured, is made payable, upon his death, to his executor, the executor is liable to the child, as for money had and received to the child's use, for the child's share of the amount of the policy collected by him from the insurers, after deducting from such amount his expenses of collecting the same, including the expenses of taking out administration here if this was the only estate of the deceased in this Commonwealth.

CONTRACT by the only surviving child of Alonzo P. Gould, late of Nashua in New Hampshire, deceased, against the defendant as his administrator with the will annexed, to recover one half of the sum received by the defendant from the New England Mutual Life Insurance Company upon a policy of insurance made by them to him at Boston on February 18, 1862, upon his life, by which they promised to pay the sum insured to him, his executors, administrators or assigns, in sixty days after due notice and proof of his death, "for the benefit of his widow, if any, and his then surviving child or children."

The testator in his will, which was duly proved in New Hampshire, declared that, for reasons therein stated, he made no bequest to his daughter, the plaintiff; appointed his wife executrix; ordered whatever sum should be paid on this policy to be

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paid to her; and bequeathed to her, to her sole and separate use, the said policy, the money due thereon at his decease, and all the benefits, privileges and rights thereunto in any way appertaining.

The defendant, who resided in New Hampshire, and was served with this writ by summons in this Commonwealth, was duly appointed and qualified administrator with the will annexed of the deceased, both in this Commonwealth and in New Hampshire, and received the amount of the insurance from the insurance company after such appointment, and refused, upon demand, to pay to the plaintiff any part thereof. The plaintiff also resided in New Hampshire.

The case was submitted to the judgment of the court upon the foregoing facts.

B. Dean, for the plaintiff.

D. S. Richardson, for the defendant.

Gray, J. The rights of the parties are regulated by the statute law of Massachusetts. It is unnecessary therefore to consider whether, by the general principles of equity jurisprudence, the policy of insurance on the life of Alonzo P. Gould, for the benefit of his wife and children, would have constituted an executed voluntary settlement which he could not have revoked by a subsequent like settlement or by will, and which could have been enforced against his representatives. See *Fortescue* v. *Barnett*, 3 Myl. & K. 36; Lewin on Trusts, (3d ed.) 86–92; *Stone* v. *Hackett*, 12 Gray, 227.

The Gen. Sts. *c.* 58, § 62, in accordance with which this policy was issued, provide that "a policy of insurance on the life of any person, expressed to be for the benefit of any married woman, whether procured by herself, her husband, or any other person, shall enure to her separate use and benefit and that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors." This is but a reënactment of a provision which has been incorporated for many years in the legislation of the Commonwealth. Sts. 1844, *c.* 82, § 1; 1854, *c.* 453, § 28; 1856, *c.* 252, § 42. See also St. 1864, *c.* 197. It proceeds upon the theory that the interest of a man's wife and children in his life, and his duty to make reasonable pro-

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vision for their support, are not wholly subordinate to the claims of his creditors; and that he may make an irrevocable settlement of a policy of insurance on his life for the benefit of his family. The words of the statute are too clear to be misunderstood. Even "if the premium is paid by any person with intent to defraud his creditors," only "an amount equal to the premium so paid, with interest thereon, shall enure to the benefit of his creditors." The security is declared by the statute to be not merely independent of the creditors of the husband or of those of the person effecting insurance, but independent of the husband or the assured himself. The manifest purpose is, not only to prevent the creditors from reaching the fund by proceedings in law or equity, but to restrain the debtor from revoking, in a moment of caprice or embarrassment, the trust which he has once created upon a meritorious, and, by the statute, a sufficient consideration.

There does not appear to have been any such statute in those states in which the decisions were made upon which the defendant relies. None is referred to in *Pennington* v. *Gittings*, 2 Gill & Johns. 208. The statute of Tennessee, under which *Rison* v. *Wilkerson*, 3 Sneed, 565, arose, only provided that an insurance effected upon a man's life should enure to the benefit of his widow and heirs, and not be subject to his debts; and did not insert the words of our statute, "independently of her husband," and of "the person effecting the same." The policy also, in that case, was in common form, without any special stipulation; and the court, in speaking of the argument that it operated as a settlement upon the widow and children of the deceased, which could not be diverted from their use and benefit by any act either of the husband or his creditors, said: "It would be more difficult to meet this argument, if indeed it could be successfully met at all, if the policy had expressly provided that in the event of death the sum secured should be paid to the widow and children."

The policy upon the life of Alonzo P. Gould is expressly made payable, upon his death, "for the benefit of his widow, if any, and his then surviving child or children." The rights of the

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widow and the surviving child are fixed by the policy; and, as their proportions are not otherwise specified, they must take equal shares. *Allen* v. *Hoyt*, 5 Met. 328. *Crockett* v. *Crockett*, 2 Phil. Ch. 555. The assured could not affect, by his will, the construction of the policy or the distribution of the proceeds thereof.

The contract of the insurance company having been made with the assured, his executors, administrators and assigns, the defendant, as his administrator, might by law collect the amount of the policy. *Burroughs* v. *State Assurance Co.* 97 Mass. 359. But it was not general assets in his hands, liable to the payment of debts, or to distribution under the will of the deceased or the law of his domicil. The defendant held it in trust, to be paid over to the widow and child of the deceased in equal parts. The plaintiff does not claim as a creditor, legatee or distributee, but as *cestui que trust* of money in regard to which the trustee has no duty but immediate payment. The plaintiff may therefore, upon familiar principles, recover the amount due to her, as money had and received to her use. *Arms* v. *Ashley*, 4 Pick. 71. *Wheelock* v. *Pierce*, 6 Cush. 288. *Carney* v. *Dewing*, 10 Cush. 498. The defendant is entitled to deduct, out of the money collected, his expenses of collection, which may include the expenses of taking out administration here, if this was the only estate of the deceased in this Commonwealth.

Judgment for the plaintiff.

KNICKERBOCKER LIFE INSURANCE COMPANY *vs.* AUGUST WEITZ & others.

An assignment by a wife to a creditor of her husband of a policy of insurance effected by her in accordance with the Gen. Sts. c. 58, § 62, or the N. Y. St. of 1866, c. 656, on her husband's life for a certain term, and, in event of his death after hers, made payable to their child, cannot affect the right of the child to the amount of the policy upon the death of the husband within that term after the death of his wife, although made with the assent of the husband and of the insurers.

BILL OF INTERPLEADER to obtain instructions as to the disposition to be made of the amount due on a policy of insurance

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made on August 27, 1866, by the plaintiffs, a life insurance company established in New York, to Caroline, wife of Louis Stauff, of Boston, upon his life for a certain term, in consideration of a premium paid by her, and expressed to be for her benefit, and payable, when due, to her executors, administrators or assigns, and, in case of her death before the death of the assured, then "payable, after the death of the latter, to her children by him, for their sole use, or to their guardian, if under age."

On August 29, 1866, said Caroline, with the consent of her husband and of the insurers, executed to August Weitz, as security for a debt due to him from her husband, a written assignment of this policy, which assignment, however, provided "that the restrictions in said policy shall remain in full force notwithstanding this assignment." On February 27, 1867, she died, leaving one only child by said Louis, named August Stauff, three years old; and on March 9, 1867, said Louis died, within the term for which his life was insured, and for which his wife had paid the premium, leaving this child, who, with his guardian, and said August Weitz, were made parties to this bill.

The case was reserved by *Hoar*, J., for determination by the full court, on the bill, answers, and an agreed statement of the facts above recited.

I. Story, Jr., for August Stauff and his guardian.

G. W. Park, for August Weitz.

Gray, J. The policy of insurance made by the plaintiffs on the life of Louis Stauff was effected, and the premium paid, by his wife, and the policy was expressed to be for her benefit, and payable, when due, to her and her executors, administrators or assigns; but if she should die before him, then, upon his death within the term insured, "to her children by him, for their sole use, or to their guardian, if under age." She did die before him, and he died before the expiration of the term for which his life was insured.

It does not appear, and is unimportant, whether this contract was made in Massachusetts or in New York; for the laws in force at the time in the two states did not materially differ, so far as this case is concerned.

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If the policy is to be governed by our laws, then, by the Gen. Sts. *c.* 58, § 62, being expressed to be for the benefit of a married woman, it enured not merely "to her separate use and benefit," but "to that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors." As the wife, in this case, was the person who effected the same, she could no more revoke or assign away the rights of her children in the policy, than her husband, if he had effected the policy, could have varied or defeated their rights therein, which, as has been adjudged, he could not do. *Gould* v. *Emerson*, *ante*, 154.

By the St. of N. Y. of 1866, *c.* 656, any married woman may obtain insurance upon the life of her husband, payable, in case of her surviving the term of insurance, to her and for her own use, free from any claims of his representatives or creditors; and the policy may be made payable, in case of her death meanwhile, to her husband, or to his, her or their children, (as shall be, and in this case has been, provided in the policy,) and to their guardian if they are under age.

The assignment of the policy by the wife contains an express recognition that "the restrictions in said policy shall remain in full force, notwithstanding this assignment." It is unnecessary to decide whether the word "restrictions," as here used, would have included the clause providing for payment to the children in a certain contingency, if that clause could otherwise have been defeated by the wife; for we are of opinion that her assignment could not defeat the rights secured to the child by the terms of the policy in the manner authorized by either statute. If the assignment of the wife passed anything, it was, at most, her own interest, which ended with her death. She having died before the termination of the policy, and her husband having also died within the term, the policy, by its express provisions, was not payable to her representatives or assigns, but to the child or his guardian; and the latter therefore, and not her assignee, is entitled to receive the amount. *Moehring* v. *Mitchell*, 1 Barb. Ch. 270. *Eadie* v. *Slimmon*, 26 N. Y. 1. *Swan* v. *Snow*, 11 Allen, 224. *Burroughs* v. *State Assurance Co.* 97 Mass. 359.

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As the assignee has not paid any premiums to keep the policy on foot, we need not consider whether, if he had, he would have been entitled to be paid those premiums or any other proportion out of the principal sum due upon the policy.

Decree for payment to the guardian of the child.

AARON H. ALLEN *vs.* MASSASOIT INSURANCE COMPANY.

A policy of fire insurance provided, in one clause, that, "if the situation or circumstances affecting the risk" on the property insured should "be so altered or changed, by or with the advice, agency or consent of the assured, as to increase the risk thereupon," the policy should become void; and, in another clause, that, if the risk should "be increased by the erection of buildings, or by the use or occupation of neighboring premises, or otherwise," or if the insurers should so elect, the insurers might terminate the insurance after giving notice to the assured. *Held*, that the policy was avoided under the first clause, without any election on the part of the insurers, or notice from them to the assured, by the erection by the assured of a factory on an adjoining lot of land under circumstances affecting the risk on the insured property.

CONTRACT on a policy of insurance against loss by fire on the plaintiff's dwelling-house, for five years from October 15, 1861. Answer, that, before any loss occurred, the policy was made void by the erection by the plaintiff, upon his adjoining lot of land, of a factory, containing a steam-engine and boiler, for manufacturing furniture.

At the trial in the superior court, before *Putnam*, J., there was proof of the issue of the policy at its date, containing two clauses which are quoted in the opinion of this court; that the plaintiff in 1862 or 1863 built the furniture factory as alleged in the answer; and that the dwelling-house was burned on June 9, 1866. Whether or not the erection of the factory increased the risk upon the dwelling-house was in contest; and evidence thereon was introduced by both parties. It did not appear that the defendants gave the plaintiff any notice of intention to terminate the insurance under the second clause referred to. The judge, however, ruled that the case fell within the first clause; the jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

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A. A. Ranney, for the plaintiff.

C. Allen, for the defendants, was not called upon.

Hoar, J. The jury having found that the situation and circumstances affecting the risk on the property insured were so altered by the agency of the assured as to increase the risk thereupon, the only question upon the exceptions taken is, whether the policy was thereby avoided. The change in circumstances was by the erection of a building on adjoining premises. There are two clauses in the policy which refer to such a state of facts. The first declares that "if the situation or circumstances affecting the risk thereupon shall be so altered or changed by or with the advice, agency or consent of the assured, as to increase the risk thereupon," "the risk thereupon shall cease and determine, and the policy become null and void, unless confirmed," &c. The second clause is as follows: "If, during the insurance, the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises, or otherwise, or if the company shall so elect, it shall be optional with the company to terminate the insurance after notice given to the assured or his representative of their intention to do so, in which case the company will refund a ratable portion of the premium." The plaintiff contends that the latter clause is the only one which applies to an increase of risk by the erection of a building, and that, as no notice was given him by the defendants, the policy was not avoided. But we do not think this the true construction of the contract. The two clauses were directed to two objects; the first, to whatever should increase the risk by the consent or agency of the assured; and the second, to whatever should increase the risk without his consent by the agency of others. The first it was intended to guard against absolutely, it being within the power of the assured to prevent. The latter, which might occur without his act, or even without his knowledge, it was just should not affect his rights without notice. The mention of the erection of buildings was merely the specification of one mode in which the risk might be increased; and appears to have been given by way of illustration. But the previous provision was general, and included all modes in which the risk should be in-

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creased by the agency of the insured. It therefore covered the condition of things which the verdict in the present case has found to have existed; and the plaintiff's policy became thereby null and void. *Exceptions overruled.*

MARY A. PERRY *vs.* PROVIDENT LIFE INSURANCE & INVESTMENT COMPANY.

A policy of insurance "for the period of twelve months" from noon of the day of its date to noon of the day of its expiration, was made "against loss of life" of the assured, in a sum payable to his widow on proof "that the assured at any time after the date hereof and before the expiration of this policy shall have sustained personal injury caused by any accident," "and such injuries shall occasion death within ninety days from the happening thereof." By an accident which happened at nine o'clock in the forenoon, the assured sustained personal injuries which occasioned his death about the same hour on the ninety-first day thereafter, excluding the day of date of the accident from the computation; the whole period being included within the twelve months. *Held*, that by no method of computation of time could the death be regarded as occurring within ninety days from the happening of the accident. *Held, also*, that the clause limiting the liability of the insurers to the occurrence of death from the injuries within ninety days from the happening of the accident was not inconsistent with the provision by which the insurance was expressed to be "for the period of twelve months;" nor could be construed to refer only to such injuries as should occasion death within ninety days after the twelve months.

CONTRACT on a policy of insurance upon the life of Calvin Perry, the plaintiff's husband. In the superior court, on agreed facts the material part of which is stated in the opinion, judgment was ordered for the defendants; and the plaintiff appealed.

A. S. Hartwell, for the plaintiff.

J. D. Ball, for the defendants.

CHAPMAN, C. J. The policy was made on the 5th of October 1866, and contains the following clauses: "This policy of insurance is for the period of twelve months, commencing at 12 o'clock (noon) on the 5th day of October, 1866, and terminating at 12 o'clock (noon) on the 5th day of October 1867," "against loss of life, in the sum of two thousand dollars, to be paid to Mary Ann Perry and her legal representatives within ninety

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days after sufficient proof that the assured, at any time after the date hereof and before the expiration of this policy, shall have sustained personal injury caused by any accident within the meaning of this policy and the conditions hereto annexed, and such injuries shall occasion death within ninety days from the happening thereof; sufficient proof being furnished to this company." It contains another clause insuring against personal injuries which shall not be fatal.

It is agreed that on the 11th of December 1866, at 9 o'clock in the forenoon, the insured met with an accident within the meaning of the policy, in consequence of which he died on the 12th of March 1867, about 9 o'clock in the forenoon. No computation of time will bring the death "within ninety days from the happening" of the accident. But the rule of computation is stated in *Atkins* v. *Sleeper*, 7 Allen, 487. When time is computed from an act done, the general rule is, to include the day. When it is computed from the day of the act done, the day is excluded. The language of this instrument requires that the computation be made from the time of the act done, namely, the accident.

But it is contended that, as this is an insurance for twelve months, the provision by which it is attempted to exempt the company from liability for the death of the insured, happening from a cause within the meaning of the policy, during said term, is inconsistent with the general object and tenor of the policy, and is void. No such inconsistency is apparent to the court. On the contrary, the policy clearly describes the cases in which the loss of life shall make the company responsible, and limits the liability to such cases.

It is further contended that, if the provision in the policy that the injuries shall occasion death within ninety days can have any legal force or effect, it must be construed to mean such injuries as shall occasion death within ninety days after the termination of the twelve months. But, as the ninety days are expressed to be from the happening of the accident, this construction cannot be adopted.

It is said that unless the clause be void, or be construed as

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above stated, an effectual life insurance for more than ninety days was impossible. If this were so, it would be a result of the terms of the contract upon which the action is brought. But here is simply an insurance against certain accidents which may happen within a given time, and result fatally within a given time after they happen. The loss in this case came very near being within the terms of the policy, but was not quite within them. *Judgment for the defendants.*

MARTIN QUIRK *vs.* DANIEL HOLT.

One who in travelling on a public way carelessly injures a laborer engaged with due care in clearing from ice the track of a street railroad lawfully located therein is liable in damages for the injury.

Forty laborers were clearing ice from one to four inches deep from the double track of a street railroad lawfully located in the middle of a public way in Boston which was forty-two feet wide and much frequented for purposes of business. The way had not been closed to travel, nor any notice given that it was not open to general use. One of the laborers, using a pickaxe, was stooping so that he did not perceive the approach of a heavily loaded wagon drawn by one horse driven at a walk eight feet from the nearest sidewalk, until, hearing a noise, rising, and turning partly around, he found himself in a space a foot and a half wide between it and another loaded wagon which was being driven slowly in the opposite direction. He immediately called to the driver of the first wagon, who was sitting on the load, to stop, and made an effort to extricate himself, and simultaneously was struck by one of the hind wheels of that wagon, and injured. *Held*, that the question whether he was in the exercise of due care at the time of the injury was for the jury.

TORT for injuries sustained by being knocked down and run over by a wagon driven by the defendant. At the trial in the superior court, before *Putnam*, J., the plaintiff introduced evidence of these facts:

On February 11, 1867, the plaintiff was at work, with thirty-five or forty other laborers, in the employment of the Metropolitan Horse Railroad Company, clearing ice from the double track of their railroad in the middle of Causeway Street, a public way in Boston, at a place in front of the passenger-station of the Eastern Railroad Company, where the street was forty-two feet wide. The ice on the track and street was from one to four inches deep. The plaintiff, working with a pickaxe, was

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stooping, so that he did not perceive the approach of a wagon, loaded with bales of rags, and drawn by one horse which the defendant, sitting on one of the bales, was driving slowly, at a walk, along the right of the middle of the street, about eight feet from the nearest sidewalk, until the horse had passed and the wagon had reached him. Then hearing a noise, the plaintiff stood up and looked around, partly turning his body, and found himself in a space about a foot and a half wide between the defendant's wagon and another loaded wagon drawn by horses, which were being driven, at a walk, in the opposite direction. He immediately called to the defendant to stop, and made an effort in vain to extricate himself; and "at the same moment" he was struck by the defendant's wagon, knocked down, run over by one of the hind wheels and severely injured.

There was no evidence that the defendant saw the plaintiff or heard him call; but the plaintiff testified that if the defendant had stopped his horse when the plaintiff called the accident would not have happened. "There was no notice in the street that any men were at work there, or that it was not proper for the defendant then to pass; and the evidence as to the number of vehicles then in the street was conflicting."

Upon this evidence, the judge ruled that the plaintiff had not shown that he was in the exercise of due care, and directed a verdict for the defendant. The plaintiff alleged exceptions.

J. Nickerson, for the plaintiff.

J. B. Richardson, for the defendant.

CHAPMAN, C. J. The court ruled that upon the plaintiff's evidence he had not shown that he was in the exercise of due care. The substance of such a ruling is, that the evidence is not sufficient in law to authorize the jury to find the fact.

The report shows that the plaintiff was a servant of the Metropolitan Horse Railroad Company, which was authorized to make and maintain tracks in Causeway Street in Boston. St. 1853, *c.* 353. Laws & Ordinances of Boston, (ed. 1863) 572. He was engaged in clearing ice from the rails and track, with thirty-five or forty other laborers, and the ice on the track and on the street varied from one to four inches in depth.

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There can be no doubt that the company had a right to put their tracks in order by removing the ice, and that the plaintiff had a right to labor for them with his pick in doing the work. Thus it appears that he was rightfully there. It is equally true that the defendant had a right to use the street as a traveller with his team; for the street had not been closed, nor had any notice been given by the proper authorities, or by any person, that it was not open to public use.

Each party, being rightfully there, owed certain duties to the other. It is settled that persons who are using a street as travellers must see to it that they do not carelessly injure other travellers. *Spofford* v. *Harlow*, 3 Allen, 176. The same principle must be applicable as between travellers and persons who are rightfully repairing a highway. And it can make no difference whether the laborer is making repairs upon the highway itself, or upon a horse railroad legally existing within its limits.

It appears in this case that the street was forty feet wide. Apparently, then, there was ample room for the defendant to pass without coming into collision with the plaintiff. But this is a question of fact for the jury. The defendant was bound to give reasonable attention to what was before his eyes in the street; and it is for the jury to find whether he would not, by the exercise of reasonable attention, have seen the laborers at work upon the track, even if it was necessary to pass over the place where they were at work; and whether he ought not to have avoided the plaintiff or warned him of his approach.

The facts that he was upon a loaded wagon, and was driving slowly, and had ample time for observation, and could easily stop his team, — all these are circumstances material to the decision of the question whether he was careless. They also tend to show whether or not the plaintiff was careless in not keeping out of the way. His duty to keep watch for the defendant's approach was not the same as if he had been at work upon a railroad where the defendant was coming with a locomotive, or as if it were upon descending ground on a highway where a mail coach was coming down towards him with great speed. And his duty to keep watch for approaching carriages that must

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pass where he was at work might depend upon his position in respect to his fellow-laborers, and upon the width of the street.

But, without going into further particulars, it is sufficient to say that the case presents a variety of circumstances to be considered in connection with each other, and depends partly upon inferences of fact to be drawn from these circumstances; and the court are of opinion that the question whether the plaintiff used due care should have been submitted, under proper instructions, to the jury. See *Spofford* v. *Harlow*, *ubi supra*; *Snow* v. *Housatonic Railroad Co.* 8 Allen, 441; *Meesel* v. *Lynn & Boston Railroad Co.* Ib. 234; *Fox* v. *Sackett*, 10 Allen, 535.

Exceptions sustained.

JAMES M. MILK *vs.* MIDDLESEX RAILROAD COMPANY.

A bill of exceptions to the refusal by the judge, at a trial, of a prayer for instructions to the jury framed on the assumption that a certain rule of law was applicable to the case, showed that he had already instructed them, without objection, that such rule was not applicable, but that another rule was so. To such evidence as was stated in the bill either rule was applicable; but the bill did not purport to recite the whole evidence. *Held*, that the exceptions must be overruled on the ground that it did not distinctly appear that the instructions prayed for were appropriate or pertinent.

TORT for injuries incurred through negligence of servants of the defendant corporation. Trial in the superior court, before *Brigham*, J., who allowed a bill of exceptions substantially as follows:

The plaintiff introduced evidence tending to show that he was at a house on Main Street in Charlestown, through which street the defendants have a double track for their street railroad, when one of the defendants' cars was signalled to stop to take him as a passenger to Boston; that it did stop, on the track furthest from the house; and that in crossing the street to reach it he was struck and injured by the horses or the pole of another car of the defendants, which was coming from Boston on the nearer track. He also introduced evidence tending to show that he exercised due care. There was conflicting evidence as to the

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rate of speed at which the car was driven at the time of the injury, the plaintiff's testimony tending to show that it was as great as ten miles per hour; the defendants' testimony, that it did not exceed six miles. There was also conflicting evidence as to whether at the time of the injury the front platform of it was occupied by a number of persons, or by the driver alone. Some of the defendants' evidence also tended to contradict the testimony introduced by the plaintiff that the car which he proposed to take for Boston had come to a full stop.

"The court instructed the jury that the defendants were liable to a suit for such damages as would indemnify any person who was injured, while in the exercise of due care, by their improper and careless running of their cars upon their tracks; that this was the general rule, but not applicable in this case; that in this case the plaintiff's right to recover depended on his proving that, when one of the defendants' cars had come to a full stop and was standing on their track to receive the plaintiff as a passenger, another car of the defendants, proceeding on their track, parallel to the track upon which their car was standing to receive the plaintiff as a passenger, passed or was passing said standing car at a rate of speed faster than a walk, and, while the plaintiff was proceeding to said standing car, said passing car, by the act of passing at a greater speed than a walk, struck and injured the plaintiff.

"To the foregoing rulings no exceptions were taken. But the plaintiff asked the following further instructions: If the plaintiff, while proceeding with due care to the defendants' car, for the purpose of entering the same as a passenger, was struck and injured by another car of the defendants proceeding at an improper or excessive speed on a track of the defendants, parallel to the track upon which was the car which the plaintiff was proceeding to enter, the plaintiff might recover in this action, notwithstanding the car which the plaintiff was proceeding to enter was not standing or had not come to a full stop on the track where they were."

This prayer for instructions the judge refused; and the verdict was for the defendants. The plaintiff alleged exceptions.

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B. Dean, for the plaintiff.

L. M. Child, for the defendants.

Foster, J. It is much to be regretted that the bill of exceptions is drawn with such brevity and ambiguity that counsel do not agree, and this court finds it difficult to ascertain, what was the real aspect of the cause at the trial, with reference to which the learned judge gave the instructions reported and declined to grant the prayer of the plaintiff for further instructions. The refusal to give a specific additional ruling is the only exception presented to our consideration.

The debate at the bar has been upon the true meaning and construction of the bill of exceptions. The defendants contend that the trial proceeded exclusively on the ground that the corporation was guilty of culpable negligence, by violating the St. of 1864, *c.* 229, § 36, which provides that "no street railway car shall pass another car standing to receive or deliver passengers in a parallel track in the same street at a rate of speed faster than a walk." If this be true, the plaintiff's prayer for instructions was wholly inapplicable to the case. On the other hand, the plaintiff contends that the trial proceeded also on the ground that the defendant corporation was liable for negligence at common law, because its car was driven at an improper and excessive rate of speed and the plaintiff was thereby injured. If this claim is right, it is conceded that the plaintiff was entitled to substantially the instructions which he asked for and which were refused.

Justice to the party who prevailed and to the judge who presided at the trial requires that the excepting party shall be held responsible for all imperfections in this bill of exceptions, and that no new trial should be granted unless he clearly shows that the instructions asked for were pertinent to the case. Bearing in mind this principle, the court are led to conclude that the plaintiff has no just cause of complaint. To the instructions actually given he takes no exception. These were, in substance, that, by the general rule of law, the corporation would be liable to any person who while using due care was injured by the improper and careless running of its cars. And this

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statement is tantamount to the subsequent ruling specially requested by the plaintiff. But the presiding judge proceeded to say that this rule was inapplicable to the case on trial in which the plaintiff's right to recover depended upon his proving a failure by the corporation to comply with the statute quoted above.

If the plaintiff had intended to rest his case on any other ground, it was his duty after such a ruling to point out the fact distinctly to the judge, and to except to the statement as to the nature of the question upon trial. Inasmuch as he failed to do so, we do not think that his subsequent prayer can be interpreted as an application to the court to submit a different and additional issue to the jury. It rather seems to have been a request for further instructions relative to the same issue. In that aspect it was properly refused. We are not satisfied that the plaintiff undertook to maintain his action on any other ground than a violation of the duty imposed by the St. of 1864.

Because it does not distinctly appear that the instructions asked for were appropriate and pertinent to the case, the

Exceptions are overruled.

JAMES E. GILLESPIE *vs.* JOHN WILDER.

Evidence that A., owning certain stock, offered to pay B. a commission if B. would sell it, and told him to communicate any offer for it, but did not name a price; that B. procured an offer of a sum which A. refused, naming a higher price; that B. then, after a conversation with C. about buying the stock, wrote to A. that he thought that A. could sell C. the stock if A. would meet C. at a certain time and place; and that A. met C. accordingly and sold him the stock at the higher price; will not support an action by B. against A. for the commission.

CONTRACT. The declaration alleged that the defendant owed the plaintiff $150 "for services and commissions for negotiating and bargaining and selling" for the defendant, at his request, forty-one shares in the stock of the Gillespie Governor Company, a corporation, "which stock was bargained and sold for

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him for $2400." The answer alleged that "the plaintiff never rendered the defendant any such services, and the plaintiff did not negotiate and bargain and sell for the defendant said stock, and said stock was not bargained and sold for the defendant."

The plaintiff testified that the defendant, owning the shares in question, "said he was willing to pay me a liberal commission, if I would sell his stock for him, — what was right, — and if I had any offer for the stock to come to him and let him know. I don't know that he mentioned any price then. I got a party to make an offer of $2100, but the defendant declined to take it, saying that he wanted to get $2400 for it. I had a conversation with John Rogers about buying the stock, and wrote to the defendant, saying to him that if he would meet Rogers the next day at the office of Gales Coffin, I thought he could sell him the stock. I wrote him that he was to pretend to Rogers that he wanted to sell him some land, and then afterwards offer him the stock. I have called on the defendant to pay me, as he had agreed to, but he has never done it. I was about two months endeavoring to effect a sale. The defendant never told me not to sell it, but continually urged me to do so, and said he was willing to pay me a good round commission for doing so."

Coffin testified "that the defendant and Rogers met at his office at the time referred to, and that there the stock was sold by the defendant to Rogers, and the certificate delivered over to him; that the stock was sold for $2400, $2000 in a check and the balance on time."

The defendant asked for a ruling that upon this evidence the plaintiff could not recover, because the evidence did not support the declaration; and the judge ruled that, though the jury might find that the plaintiff had rendered services for the defendant for which he was entitled to compensation, yet upon the evidence he could not recover without amending his declaration. The plaintiff declined to amend; and thereupon the judge directed a verdict for the defendant; and the plaintiff alleged exceptions.

F. W. Sawyer, for the plaintiff.

C. M. Ellis, for the defendant, was not called upon.

Colt, J. This action is to recover commissions for nego-

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tiating and selling certain shares of stock in a corporation. The whole evidence produced negatives any sale of the stock by the plaintiff. The sale was actually effected by the defendant in the absence of the plaintiff. The services rendered for the defendant were not those stated in the declaration. If of any value to the defendant, and rendered at his request, upon promise of compensation, express or implied, they may be recovered for under a count properly framed. *Exceptions overruled.*

WILLIAM P. BOYNTON *vs.* SILAS WARREN.

Evidence that furniture attached on mesne process in the house of the defendant was left there by the officer, without the defendant's consent, in the custody of a keeper who went away every night leaving no one in charge of it; that on the third day after the attachment the defendant gave the officer notice to remove the keeper, and forbade him to remove the furniture; and that the next morning the keeper went away, leaving no one in charge of the furniture, and giving no intimation of his purpose in going away, nor when he would return; is sufficient to warrant a finding that the attachment was abandoned.

Personal property subject to a mortgage and remaining in the possession of the mortgagor was attached in an action against the mortgagor, and the mortgagee was summoned therein as trustee. The mortgagee served on the officer a written statement of the debt for which the property was liable to him, and demanded payment thereof. Within ten days afterwards the attachment was abandoned; but after such abandonment the officer forcibly resumed possession. *Held*, that the mortgagee might replevy the property from the officer, although the issue of the validity of the mortgage, which was raised in the action against the mortgagor, on the question of charging the trustee, remained undetermined.

REPLEVIN of furniture. Writ dated July 10, 1865. Trial in the superior court, without a jury, before *Morton*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff claimed title to the property as mortgagee thereof under a mortgage from Susan M. Badger, dated November 1, 1864. On the writ in an action against Badger, in which this plaintiff was summoned as trustee, this defendant, a constable of the city of Boston, attached the property in Badger's house on June 6, 1865, and left there a keeper of it; and on the same day this plaintiff gave the defendant written notice of his

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mortgage and of the record thereof, and that eight hundred dollars was due thereon, and demanded of him payment of that sum. The keeper "left the house every night without leaving any one in charge of the property;" and on June 8 Badger gave the defendant written notice to remove the keeper forthwith, and forbidding the removal of the property. On June 9, the keeper "left the house to get his breakfast, leaving no one in charge of the furniture, but he gave no information as to the object or purpose for which he left." On his way back he met the defendant, who proceeded with him to the house, where they found the door fastened by Badger, who denied them admission. The defendant then procured a ladder, and by aid of it entered the house through a window which was partly open, doing this against the will of Badger, although she offered no forcible resistance; and, having thus entered, proceeded to remove the property, and held it in his possession till it was taken on the writ of replevin. At the time it was so taken the action against Badger was still pending, on the question of charging the trustee; and the issue of the validity of the mortgage, which was raised therein, was undetermined.

"No question was raised as to the validity or registration of the mortgage, nor as to the fact that the property removed by the defendant was included in the mortgage."

The judge "held that the attachment, if valid, was lost as against both said Badger and the plaintiff by reason of the facts above stated, and that the entry through the open window, as described, was a trespass by the defendant;" and directed judgment for the plaintiff. The defendant alleged exceptions.

E. S. Cutter & I. J. Cutter, for the defendant.

J. S. Abbott, for the plaintiff.

Colt, J. Unless the defendant can justify under his attachment, the plaintiff must prevail. As mortgagee of the property, having the right of immediate possession, he may maintain this action against a trespasser. In order to continue his special title in the property taken, an attaching officer must retain the actual or constructive possession of it. A voluntary surrender or abandonment of the property releases the attachment. *Bag-*

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ley v. *White*, 4 Pick. 397. *Sanderson* v. *Edwards*, 16 Pick. 144. *Esson* v. *Tarbell*, 9 Cush. 412. The question presented is, whether the evidence submitted was sufficient in law to justify the finding, as matter of fact, that there had been an abandonment in this case. A jury trial was waived, and the question left to the judge; but his findings of facts submitted to him are to be treated like the verdicts of the jury. It is only when the evidence is all reported and has no tendency to support the legal propositions necessary to sustain the verdict of the jury or the finding of the judge, that this court can interfere on exceptions. The question is not that which is presented on a motion for a new trial because the verdict is against the weight of evidence. *Forsyth* v. *Hooper*, 11 Allen, 419. *Cheever* v. *Perley*, Ib. 587.

It seems to us that there was evidence submitted from which a jury might legally find, under proper instructions from the court, that there was an abandonment of the property attached by the defendant Warren. The articles were never removed, but were left in the custody of a person who left the house every night, leaving no one in charge. The defendant was notified to remove his keeper, and forbidden to remove the goods, and on the following day the keeper left, leaving no one in charge and giving no intimation as to his purpose in leaving or when he should return. It would seem to have been the duty of the defendant, after the notice, to proceed at once to remove the goods from the premises of the defendant in the suit, where they were left without her consent. It is, certainly, as the defendant claims, not necessary that the officer or keeper should remain constantly in immediate contact with or custody of the property attached; nor need his possession always be actual. It is sufficient if he has the constructive possession. But, taking all the circumstances into consideration, we see no reason for disturbing the findings of the court below.

The present plaintiff, as mortgagee, was summoned as trustee in the suit in which the property was attached; and that suit, it seems, was still pending and the trustee not discharged when this action was brought. The defendant now claims that this action is prematurely brought. The provisions of Gen. Sts.

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c. 123, §§ 67–71, establish a procedure by which creditors may avail themselves of mortgaged personal property of their debtors, and at the same time test the validity of the mortgage. Before this statute, no person could be charged as trustee who had no goods or effects in his possession. The mortgaged property was indeed attachable, subject to the right of the mortgagee to demand payment of the amount due on his mortgage; but the whole proceeding was quite different from the one introduced by the new statute. Having commenced by attaching the mortgaged property and summoning the mortgagee, the creditor must pursue his remedy in the mode pointed out by this statute. It has been held that by discharging the supposed trustee he vacates the attachment of the property, and entitles the mortgagee to the possession thereof. *Martin* v. *Bayley*, 1 Allen, 381. It is not necessary to decide what effect the abandonment of the attachment of the specific articles mortgaged may have upon the question of charging or discharging the supposed trustee. If discharging the trustee vacates the attachment, then abandoning the attachment would seem to operate to discharge the trustee, by parity of reasoning. At all events, the plaintiff, it seems to us, was, immediately upon the abandonment, entitled to the possession as against this defendant, and the action was not prematurely brought. *Exceptions overruled.*

SAMUEL J. ROSS *vs.* EDWARD HARPER.*

It is no ground for reversing or modifying a decree enjoining the plaintiff in an action at law, in which he has obtained a verdict, from further prosecuting the same, that it provides that in such action neither party shall recover costs.

In an action at law neither party has a legal claim for costs against the other until after a final judgment.

APPEAL by the defendant in a suit in equity from a final decree of *Colt*, J., "that the injunction heretofore issued in this suit be made perpetual, and that said defendant Harper be and

* This case was argued July 1, 1868, before all the judges but WELLS, J.

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hereby is perpetually enjoined from prosecuting the suit at law now pending for the recovery of the said plaintiff's law library, or any other action at law for the same cause; and said Harper is directed to discontinue the suit now pending as aforesaid; provided that neither party shall be entitled to recover costs in said suit at law against the other. And said defendant is further ordered and decreed to deliver the said law library of the plaintiff to him, free of any charge or incumbrance created by him thereupon. And it is further decreed that in this cause neither party shall have or recover any costs of the other."

S. J. Ross, pro se.

E. Harper, pro se.

By the Court. This is a simple appeal from a final decree in a suit in equity, without any assignment of reasons of appeal, and without any report of evidence or of facts found by the judge who heard the cause, and made the decree. There is nothing therefore before us except to see whether the decree is justified by the record. We find no error upon the record, and no reason for altering the decree.

The decree enjoins the defendant from further prosecuting a suit at law. The defendant objects that this should not be done, because he has obtained a verdict in the suit at law upon grounds to which there were no legal exceptions. But the very foundation of the suit in equity is, that the plaintiff has equitable rights of which he could not avail himself in defence of an action at law; that the prosecution of the suit at law is inequitable; and that a court of equity should interfere for his protection.

The defendant at the hearing says that he should be content to have the decree affirmed if he could have his costs paid in the action at law. But the judge who heard the case has decided that the suit at law could not be prosecuted consistently with the equitable rights of the plaintiff in this suit, and must have based his decree upon that finding. It follows that the costs which this defendant incurred in the action at law were inequitably incurred, by pursuing the action in violation of the equitable right of the other party.

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But an equally strong objection to his claim is this, that there are no costs which the law recognizes as existing, and the basis of a legal claim, by one party in an action at law against another, until there is a final judgment entered thereupon.

Decree affirmed; with costs of the appeal for the plaintiff.

WILLIAM S. ATWOOD *vs.* FRANCES B. SCOTT.

On the trial of an action for money lent, evidence that the defendant had money in his possession at a certain time is inadmissible to corroborate his testimony that at a time soon afterwards he repaid the plaintiff.

On the trial of an action for money lent on the alleged representation of the defendant that he could not pay rent and his landlord was about to sue for possession of the tenement, the defendant testified that he paid rent punctually and never had difficulty with the landlord. *Held*, that, to contradict him, and to show his want of means, the plaintiff might prove by the record of the court that just before the time of the alleged loan the landlord commenced such an action, in which the defendant appeared and consented to judgment against himself, and that no execution issued on the judgment.

A witness in a civil case is not bound to attend court after the time for which his fees have been paid or tendered to him.

CONTRACT for money lent to the defendant and money paid to her use at her request. Answer, accord and satisfaction.

At the trial in the superior court, before *Rockwell*, J., the defendant having testified that she repaid to the plaintiff three hundred dollars at one time; twenty-five dollars each, at two other times; and a hundred and fifty dollars at a fourth time; was allowed, for the purpose of corroborating her testimony, and against the plaintiff's objection, to introduce evidence that immediately before said first and fourth times she had considerable sums of money in her possession.

The plaintiff testified that he lent part of the money sued for on the defendant's representation that she could not pay her rent and that John Nute, her landlord, was about to commence an action against her for possession of the house which she occupied. The defendant testified, on the contrary, that she paid her rent regularly and had no difficulty with her landlord. The

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plaintiff then offered to show by the record of the municipal court of the city of Boston, where the defendant resided, that immediately before he lent her that part of the money Nute obtained a judgment against her for possession of the house in an action in which she appeared by counsel and consented to a default, and that no execution was ever issued on the judgment; but the judge refused to admit such evidence.

During the trial, the plaintiff applied for a *capias* for a witness whose testimony he claimed to be material, who had been in attendance the day before and been paid his fees for that day, but had not been paid or tendered, nor had asked, any fees for further attendance. The judge refused the application; ruling that it was the plaintiff's duty to tender fees to the witness for the second day without waiting for the witness to ask for them, and that, not having done so, he was not entitled to the writ; and the plaintiff was obliged to rest his case without the testimony of this witness.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. D. Thomson, for the plaintiff.

S. E. Floyd, for the defendant, submitted the case without argument.

Chapman, C. J. Experience is not sufficiently uniform to raise a presumption that one who has the means of paying a debt will actually pay it. Accordingly it is held that the fact that a debtor has had such means is not evidence tending to show that the debt has been paid. *Hilton* v. *Scarborough*, 5 Gray, 422. On the other hand, the fact that one has not had the means to make certain payments is evidence tending to show that he has not made them, and such evidence is held to be admissible. *Stebbins* v. *Miller*, 12 Allen, 591. *Winchester* v. *Charter*, 97 Mass. 140.

The defendant's testimony that she had considerable sums of money in her possession, was erroneously admitted for the purpose of corroborating her testimony that she had paid the plaintiff; and the evidence as to Nute's judgment against her was erroneously excluded, because it tended not only to show

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her want of means, but to contradict her testimony that she paid her rent punctually and had no difficulty with her landlord.

The *capias* which the plaintiff applied for was rightly refused, because a person is not bound to attend court, or remain in attendance, as a witness, unless his fees have been paid or tendered to him. This seems to the court to be a reasonable construction of the statute; Gen. Sts. *c.* 131, § 3; and to impose no unreasonable burden upon parties.

First and second exceptions sustained; third exception overruled.

JONATHAN BROWN, JR. *vs.* BENJAMIN F. BUTLER.

In an action on a promissory note to charge as a promisor a party whose indorsement thereof appears below the indorsement of the payee to the plaintiff, parol evidence is admissible to show that the defendant's indorsement was made before the delivery of the note by the maker to the payee for value.

CONTRACT on a promissory note signed by R. S. Alexander, payable on demand to the order of George Skolfield, and indorsed: "Pay to Jonathan Brown, Jr. or order. John Rogers, Adm'r Estate of George Skolfield." "Butler & Co."

At the trial in the superior court, before *Vose*, J., the signatures of all the parties were admitted, and the plaintiff offered parol evidence to show "that the indorsement of the administrator of the payee was put on the back of the note after the name of Butler & Co. was placed there, and after the note had been delivered to the payee for value with the name of Butler & Co. upon it."

The judge ruled that parol evidence was inadmissible for this purpose, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

D. P. Kimball, for the plaintiff.

H. A. Scudder, for the defendant.

HOAR, J. It appears from the bill of exceptions that the

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plaintiff offered parol evidence to show that George Skolfield was the owner of the promissory note declared on, signed by R. S. Alexander, and payable to the order of George Skolfield on demand; and that the name of Butler & Co. was upon the back of the note when it was passed to the payee for value. It is settled by a long series of decisions in this Commonwealth that this state of facts would make Butler & Co. liable as original promisors upon the note; and that parol evidence is competent to show it. The earlier cases are collected and commented on in the case of *Union Bank* v. *Willis*, 8 Met. 504.

The subsequent indorsement of the note to the plaintiff by the administrator of Skolfield, although written above the name of Butler & Co., could not affect the obligation of the parties already established. The cases upon which the defendant relies, and which have held that the contract which appears to be made by a party to a note, by the manner in which his name is affixed to it, cannot be varied or qualified by parol evidence, will all be found on examination to be cases in which it was held that the condition of the note when it was first delivered as a binding and valid contract is the real test; and that it is not allowable to prove by parol that a different contract was intended from that which the note itself and the position of the several names upon it would then indicate. *Clapp* v. *Rice*, 13 Gray, 403. *Stimson* v. *Silloway*, and *Powers* v. *Eastman*, Ib. 405, note. *Prescott Bank* v. *Caverly*, 7 Gray, 217. *Wright* v. *Morse*, 9 Gray, 337. *Slawson* v. *Loring*, 5 Allen, 340. So a party who puts his name upon a note after it has once been negotiated can only be held to the contract which his signature imports, upon such a note as it was when he put his name upon it. But his signature, wherever placed, cannot change the obligation of any other parties to the note, whose signatures had been previously affixed, and whose contract had already become complete and obligatory by the delivery of it as an executed instrument. *Howe* v. *Merrill*, 5 Cush. 80.

The case most nearly like the one at bar, and very closely resembling it, is *Pearson* v. *Stoddard*, 9 Gray, 199. That was an action upon a promissory note, against Stoddard and Whithead

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as promisors. The note was signed by Stoddard, payable to Scott or order, and indorsed by Scott; and under the indorsement of Scott appeared the words "Waiving demand and notice. Darius Whithead." It was held that parol evidence was admissible to show that Whithead put his signature upon it before it was delivered to Scott, and that he was liable as an original promisor. That case is decisive as an authority upon the question now before us; and the parol evidence which was excluded at the trial should have been admitted.

Exceptions sustained.

NATIONAL BANK OF THE REPUBLIC *vs.* JOHN CONLAN.

The payees of a promissory note indorsed it to a bank for discount in regular course of business, received and used the proceeds, and, on failure of the maker to pay it at its maturity, arranged with the bank not to call upon them as indorsers, but sue the maker; and as part of such arrangement deposited with the president of the bank individually funds to secure the bank against loss on the note. In the action, they were summoned as trustees of the maker, and defaulted. *Held*, that these facts did not affect the rights of the bank as indorsee.

TRUSTEE PROCESS to recover the amount due on a promissory note made by John Conlan and dated September 25, 1866, for $5724.60, payable three months after date to the order of John P. Squire & Co., and by them indorsed to the plaintiffs. Writ dated January 7, 1867. The answer of Conlan alleged that he made the note without consideration; and further, denied ownership of the note by the plaintiffs, and alleged that it remained property of the payees, and that the action was prosecuted for their benefit and to enable them to avoid claims of which he might have availed himself by way of set-off in an action brought in their name. The payees were summoned as trustees, and were defaulted.

To interrogatories filed by the defendant, the president and cashier of the plaintiffs answered, that the note was received by the bank from the payees on September 26, 1866, and discounted in regular course of business; that the proceeds were carried to

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the credit of the payees on their account with the bank and used by them in common with their other funds there deposited; that after the protest of the note for nonpayment at maturity, Squire proposed to the plaintiffs "that, as the bank had taken the note originally by discounting the same, they should still keep it and sue it themselves and not compel John P. Squire & Co. to take it up first, and that he would in that event secure the bank against loss if the note was not collected of the maker; that the maker would probably pay it to the bank sooner than he would if taken up by the indorsers;" that Squire then put into the hands of the president in his unofficial capacity funds "to hold for the parties as security for the bank against all loss on the note," "and the bank consented, and did do as was proposed;" that the note was sued by the directors and the suit prosecuted for the benefit of the bank; and that the note was, and ever since it was discounted had been, the property of the bank, and had never been taken up or paid by the payees.

At the trial in the superior court, before *Ames*, C. J., the plaintiffs put the note in evidence, and rested their case; and the defendant put in evidence his interrogatories and the answers of the plaintiffs, and, "having no further evidence upon this part of his case," asked the judge to rule on the facts thereby disclosed that "he was entitled to make the same defence to the note that he could under his answer if John P. Squire & Co. were the plaintiffs." The judge refused so to rule; and directed a verdict for the plaintiffs. The defendant alleged exceptions.

S. J. Thomas, for the defendant.

A. A. Ranney, for the plaintiffs, was not called upon.

CHAPMAN, C. J. Upon the evidence, which consisted of the note in suit, and the answers of the plaintiffs' president and cashier to the defendant's interrogatories, the jury were correctly instructed to find a verdict for the plaintiffs. For it appeared that the note was indorsed to the plaintiffs by the payees, in the ordinary course of business, before its maturity, and remained their property. The fact that the indorsers had given them security for the note, and had requested them to collect it of

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the maker, and the further fact that they had summoned the indorsers as trustees of the defendant, did not affect their rights as indorsees. *Exceptions overruled.*

WALTER AIKEN *vs.* JOSEPH A. HYDE & another.

As part of the consideration for the price paid for a machine, the seller of it agreed with the buyer, that if on a fair trial by the buyer it should not "prove to be suited for the purpose" for which he bought it, and "entirely satisfactory in all respects" to him, he might return it, and the seller, on receiving it, would pay back the price. The machine, on a fair trial by the buyer, "failed to answer the purpose for which he bought it," and proved unsatisfactory to him; and he returned it without first giving the seller notice of any difficulty, or opportunity to remedy it, and sued him for the price, after demanding and being refused repayment thereof. *Held*, that the buyer was not bound to give any such notice or opportunity; and that it was immaterial that the machine, after its return to the seller, worked well, under his management, without alteration or repairs.

CONTRACT to recover the price paid for a machine for generating gas. The declaration alleged the purchase of the machine by the plaintiff from the defendants, and "that it was understood and agreed between the plaintiff and the defendants at the time of the sale of said machine that, if the said machine should not upon a fair trial by the plaintiff prove to be suited for the purpose for which the plaintiff bought the said machine, and entirely satisfactory in all respects to the plaintiff, the plaintiff should have the right to return the said machine to the defendants, and the defendants should, upon the return of the said machine by the plaintiff and the receipt thereof by the defendants, pay back to the plaintiff the price paid by him for said machine."

At the trial in the superior court, before *Putnam*, J., the plaintiff's evidence showed that he bought the machine from the defendants in Boston in December, 1866, for use in his dwelling-house in Franklin, New Hampshire; and that the defendants, as part of the consideration for the price paid by him, made the agreement recited in the declaration; that the machine was set up in the plaintiff's house by a servant of the defendants, who gave the plaintiff's servant directions how to manage it; and

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that the plaintiff's servant had general charge of the machine until in January 1867 the plaintiff returned it to the defendants, and demanded repayment of the price, which they refused to make. And the plaintiff's evidence tended to show "that the machine failed to answer the purpose for which he bought it, and which it was promised by the defendants that it should answer;" that he and his servant followed the directions given by the defendants' servant, but that the machine proved unsatisfactory to him after repeated trials.

It also appeared that no notice was received by the defendants of any difficulty with the machine till it was returned to them; nor any opportunity afforded to them to remove such difficulty, if any existed; and their evidence tended to show that immediately after receiving it back they set it up, without alteration or repairs, in their place of business in Boston, where it had worked without difficulty ever since.

The defendants asked the judge to rule "that, as matter of law, the plaintiff was bound to give notice to the defendants, so as to give them a fair opportunity to make the machine satisfactory, before returning it." The judge refused so to rule; the jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

C. S. Lincoln, for the defendants.

C. Browne, for the plaintiff.

By the Court. In returning the machine, the plaintiff merely exercised a right which was expressly reserved to him by the terms of the contract, as the same is stated in the declaration.

Exceptions overruled.

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ELIJAH A. QUINTARD & others *vs.* JEREMIAH A. BACON.

The seller of goods by an oral agreement for the price of more than fifty dollars shipped them from Philadelphia consigned to the buyer at Boston, where he left the bill of lading at the office of the buyer, who then and for more than a week afterwards was sick and absent in the country. A week after the bill of lading was thus left, the buyer's clerk wrote to him that it was in the office, which was his first notice of the fact. Prior to the day when he received the clerk's letter he had given the seller notice that he would not receive the goods, which notice he repeated on that day; and he answered the clerk without delay, directing him to return the bill of lading; and the clerk did so immediately, but after the goods had arrived at Boston. In the absence of any evidence that the clerk was authorized to receive and accept the bill of lading, *Held*, that there was no acceptance of the goods sufficient to take the case out of the statute of frauds.

CONTRACT for the price of two hundred and fifty tons of coal at seven dollars per ton, sold by the plaintiffs to the defendant, and shipped by them from Philadelphia, consigned to him at Boston.

In the superior court these facts were agreed: The defendant gave an oral order to the plaintiffs for the coal, on February 9, 1866. The bill of lading of it was signed on February 27 at Philadelphia, and left at the defendant's office in Boston at some time during the first three days of March. The defendant was sick at Bedford, fifteen miles from Boston, and absent from his office from March 1 to March 20. On March 6 he, by his agent, gave notice to the plaintiffs that he would not receive the coal, and on March 10 repeated the notice. On March 10 his clerk wrote to him that the bill of lading was in his office, which was the first notice he received of that fact: and on March 11, by the first mail after receiving the clerk's letter, he instructed the clerk to return the bill of lading to the defendants, which the clerk did on the same day, but after the arrival on that day of the coal at Boston. And the defendant never received the coal.

On these facts, *Putnam*, J., ruled that the plaintiffs could not recover, and directed a verdict for the defendant. The plaintiffs alleged exceptions.

T. Dean, for the plaintiffs.

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H. F. Smith & W. W. Swan, for the defendant, were not called upon.

Hoar, J. The contract upon which the plaintiffs sue was a contract for the sale of merchandise, for the price of more than fifty dollars. There was no memorandum of the contract in writing, and it was therefore not a valid contract, unless the defendant accepted and received some part of the merchandise. Gen. Sts. *c.* 105, § 5. The only acceptance relied upon was a constructive acceptance by the receipt of the bill of lading. But whatever might be the effect of the receipt of a bill of lading, with the intention and for the purpose of thereby assuming the ownership and control of the property therein described, we are unable to find upon the evidence reported that the defendant ever accepted the bill of lading itself. It was left with his clerk, when the defendant was sick and absent. There is no evidence that his clerk was authorized to receive and accept it. Before the defendant knew that it had been left, he had notified the plaintiff through his agent that he would not receive the cargo. On the day on which he learned from his clerk that the bill of lading had been left at his place of business, he repeated the notice to the plaintiffs, and by the next day's mail directed the bill of lading to be returned to them; which was immediately done. There is no authority for the proposition that the delivery to the carrier would pass the title in the cargo to the defendant, and the case of *Frostburg Mining Co.* v. *New England Glass Co.* 9 Cush. 115, is a direct decision to the contrary. There was therefore not even a constructive acceptance. The defendant never received the bill of lading with an intent to accept it, or assume any ownership or control of the merchandise.

Exceptions overruled.

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JAMES S. HANCOCK *vs.* VINCENT COLYER & wife, & trustees.

An attorney at law summoned as trustee in a process of foreign attachment answered that when he received service of the writ he had in his hands a check drawn payable to his order on a bank, but never indorsed nor presented for payment, which he had received, by direction of the principal defendant, in satisfaction of an execution obtained by such defendant in another action, said defendant assuming all risk of its collection; and that, after said service, he presented the check at the bank, and received payment of it, and was holding the proceeds. *Held*, that he was not chargeable as trustee.

TRUSTEE PROCESS. Chandler, Shattuck and Thayer, attorneys at law, the parties summoned as trustees, filed an answer, denying that they had goods, effects or credits of the principal defendants intrusted or deposited in their hands or possession at the time of service of the writ upon them, otherwise than as follows: that they then had in their hands a check for $13,069.60, drawn by Arthur W. Austin on a national bank in Boston, and payable to their order, which they had not indorsed nor presented for payment, and had received under special instructions from Colyer, acting for himself and as attorney for his wife, in satisfaction of an execution issued on a judgment obtained by Colyer and his wife against Charles D. Hancock, and with the full understanding and agreement with Colyer, acting as aforesaid, that they were not to be liable in any manner for any loss on the check, he assuming all the risk of its collection; that, at the time of receiving the check, they, as attorneys of the plaintiffs in said action, indorsed on the execution a receipt for the amount thereof, in full payment and satisfaction of the same; and that, subsequently to the said service upon them, they presented the check to the bank, and received payment thereof, and were holding the proceeds. From the order of the superior court discharging the trustees on this answer the plaintiff appealed.

C. R. Train, for the plaintiff.

J. E. Hudson, for the trustees.

COLT, J. The check of a third party payable to the order of the supposed trustee is not attachable by trustee process. It is not money, goods, effects or credits, in the sense of the statute. It may never be paid. The liability of the trustee to the prin-

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cipal defendant is therefore contingent. If the transaction between the parties is such as to create a debt due absolutely, whether the security held be good or not, the trustee would then be charged. *Wood* v. *Partridge*, 11 Mass. 488. *Lupton* v. *Cutter*, 8 Pick. 298. *Meacham* v. *Mc Corbitt*, 2 Met. 352. *Lane* v. *Felt*, 7 Gray, 491. It would seem that a check before presentment cannot operate as an assignment of the fund, or create any lien upon it in the drawee's hands. *Dana* v. *Third National Bank*, 13 Allen, 445.

It is attempted to distinguish this case from *Lane* v. *Felt* on the ground that the check was received as money by direction of the plaintiffs in the suit of *Colyer & wife* v. *Hancock*, and that it was paid to the supposed trustees after service. As to the first, the answer does not show that it was taken as money. As between the trustees and the principal defendant all that appears is, that by direction of those plaintiffs it was received in satisfaction of the execution. The trustees were not in any manner to be liable in the event of the check proving worthless, said Colyer taking all the risk of its collection. The other ground of distinction cannot prevail against the well settled rule that the validity of the attachment must be determined by the state of facts existing at the time of the service of the writ. *Meacham* v. *Mc Corbitt*, 2 Met. 352. *Trustees discharged.*

EZEKIEL W. PIKE *vs.* MARY F. STEPHENSON.

A devise recited that the testator gave to his daughter, (who, with her children, survived him,) land for her life, "and, in the event of her decease, I do then give the same in equal shares to her children and their heirs and assigns." *Held*, that the devise over gave to her children vested remainders in fee simple.

PETITION FOR PARTITION of a house and land on Myrtle Street in Boston, formerly owned by Daniel Gregg, whose will, besides other devises and bequests not material to be quoted, contained the following:

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"Fourth. I give, devise and bequeath unto my daughter, Mary N. Pike, the use and improvement of my house on Myrtle Street in the city of Boston, and the lands, outbuildings and appurtenances connected therewith, to hold during her natural life; and in the event of her decease, I do then give, devise and bequeath the same in equal shares to the children of said Mary N. Pike, and the children of any deceased child of said Mary N. Pike, who shall take the parent's share by representation, to hold to them and their heirs and assigns forever."

"Ninth. I give, devise and bequeath unto my said daughter Mary N. Pike, if she shall be living at the time of my decease, all the rest and residue of my estate, both real and personal, to hold the same to her, her heirs, executors and administrators; but in case she shall die before me, then I give, devise and bequeath the same to the children of said Mary N. Pike, who shall then be living, and to the child or children of any deceased child of said Mary N. Pike, who shall take by representation the shares of their respective parents."

Mary N. Pike, the testator's daughter, and her husband, the petitioner, had two children living at the date of the will and of the testator's death, namely, Daniel G. Pike, (who died, of age, unmarried, and without having made any conveyance of the premises,) and the respondent. Mary N. Pike survived her son, and died before this petition was filed. The petitioner contended that the interest of his children under the fourth clause of the will vested immediately upon the death of the testator, and claimed one undivided half of the house and land in Myrtle Street by inheritance from his son. The respondent contended that the remainder was contingent until Mrs. Pike's death, and then went to the respondent as her sole surviving child. The parties submitted the case above stated to the judgment of the court.

J. A. Loring, for the petitioner.

T. H. Sweetser, for the respondent.

GRAY, J. The ordinary presumption is, that all devises and bequests vest upon the death of the testator; and there is nothing in the provisions of this will to control that presumption.

The devise, in the fourth article of the will, of the use and

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improvement of the land in question to Mrs. Pike was a devise of the estate to her for life; and the devise over to her children, and to the children of any deceased child by right of representation, gave the children of Mrs. Pike, living at the death of the testator, vested remainders in fee. The devise over is not restricted to such of her children or grandchildren only as may survive her, but is to all her children and the children of any deceased child. The words, "in the event of her decease, I do then give," do not express a contingency which may or may not happen, but an event which is sure to arrive, sooner or later; and define, not the time when the remaindermen are to be ascertained, or when their titles are to begin, but when they are to receive the possession, use and enjoyment of their shares. *Brown* v. *Lawrence*, 3 Cush. 390. *Wight* v. *Shaw*, 5 Cush. 56. *White* v. *Curtis*, 12 Gray, 54. *Womrath* v. *McCormick*, 51 Penn. State, 504. *Doe* v. *Considine*, 6 Wallace, 458.

The language of the ninth article of the will tends rather to confirm than to weaken this conclusion. That article contains a residuary devise and bequest to Mrs. Pike in fee; but in case she shall die before the testator, then, instead thereof, a like devise and bequest is made to her children "who shall then be living," and the children of any deceased child. The words "who shall then be living" in this article, refer to the time of the testator's death, and their insertion here gives to the omission of any like words in restriction of the remainder clause in the fourth article the marks of deliberate intention.

Judgment for the petitioner.

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Caleb W. Loring *vs.* Mary E. Coolidge & others.

A testatrix in her will gave "the improvement of my property in trust to" a trustee named, "the income to be paid equally to my brother and my sister during their natural lives, and at their death the principal I give to my nephews and nieces then surviving." The brother died after the death of the testatrix, and left the sister surviving. *Held*, that the whole income of the property was payable thereafter to the sister until her death, until which time the gift over in remainder to the nephews and nieces was not to take effect.

Bill in equity by the trustee under the will of Sarah G. Coolidge, who died in 1861, to obtain the instructions of the court as to the disposal of the trust fund after the death in 1865 of the brother of the testatrix. The case was reserved by *Foster*, J., on the bill and answers, for the determination of the full court, and is stated in the opinion.

J. Lathrop, for the sister of the testatrix.

S. Snow, for the nephews and nieces.

Wells, J. The terms of the will are: "I give the improvement of the balance of my property in trust to" a trustee named, "the income to be paid equally to my brother" "and my sister" "during their natural lives, and at their death the principal I give to my nephews and nieces then surviving." The brother having deceased, the nephews and nieces claim that the estate should be divided, and one half now distributed. They contend that the direction that the income be paid equally to the brother and sister has a distributive effect upon the whole clause, and operates to transmit the property in halves; that upon the death of either of the beneficiaries for life the trust is *functus officio* as to half of the trust fund, and therefore the principal of that half becomes at once distributable to the legatees in remainder.

The word "equally" has no direct application except to the mode of paying over the income after it is received by the trustee. The language of the clause indicates that the balance of the property is to constitute one fund, the income or "improvement" of which is to be received by the trustee during the lives of the brother and sister; after which the principal is given as

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one fund to a single class, consisting of nephews and nieces, *per capita*. The time for this gift to take effect, and for determining what individuals are to constitute this class, is fixed as of a single event. "At their death," as a point of time, is the date when both shall have deceased. These words may be, and sometimes are, construed distributively, when the nature or order of the sequent dispositions is such as to require it; as when the subsequent interests are given, *per stirpes*, to the children or other representatives respectively of those (not husband and wife) who are to enjoy the income during their lives. *Willes* v. *Douglas*, 10 Beav. 47. *Abrey* v. *Newman*, 16 Beav. 431. *Arrow* v. *Mellish*, 1 De Gex & Smale, 355. But in such cases the interpretation of the ambiguous term is governed by the apparent intent that the subsequent interests shall pass separately to each class, as succeeding to the share of the parent or other *cestui que trust* for life whom they respectively represent. Slight indications of intent are sufficient for this purpose.

In the present case there is no such ground of interpretation. There is but a single class to take the whole remainder, and they *per capita*, not as representatives of the brother and sister. The gift to them has no reference to their relations to the brother and sister, but only to their relations to the testatrix. The apparent intent therefore seems to us to accord best with the natural interpretation of the words, making the gift over in remainder take effect only upon the termination of the trust by the decease of both brother and sister. The agreed fact, that none of the nephews or nieces are children of either of the beneficiaries for life, tends to confirm this interpretation as in accordance with the probable intent of the testatrix.

Another question arises in the case from the fact that there is no gift over of income upon the death of one only of those to whom it is payable for life. This is relied upon, on the one side, as favoring the construction which would give the principal of one half of the fund to nephews and nieces at once; while, on the other, it is claimed that the whole income is payable to the survivor. The provision that the income is "to be paid equally" to the brother and sister does not necessarily imply a

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separation of their interests in the trust. Payment of the income, one half to each during their joint lives, and the whole to the survivor, is equal as between them. If there were anything in the will to indicate a gift over of income, the payment would be made equal by a division between the survivor and the successors to the share of the deceased beneficiary for life. *Jones* v. *Randall*, 1 Jac. & Walk. 100. The omission to make any other disposition of the income, during the life of the survivor, is quite as significant upon the one side, as the omission to provide specifically for the right of survivorship is upon the other.

If the direction "to be paid equally" were to be construed to apply strictly to each payment of income, it would render the trust impossible of execution after the death of one of the *cestuis que trust*. Payment to the survivor exclusively of any part of the income, or the income of any part of the trust fund, would be as repugnant to such a direction as payment of the whole. Such a construction would limit the trust to the joint lives of the brother and sister.

The construction contended for seems to be, that the right to one half of the income, as a fixed, definite right, became vested in each, for their respective lives; and that this right cannot be enlarged in the survivor by the death of the other. This construction not only puts a constrained and narrow interpretation upon the words used, but, as has been already indicated, does not accord with the general purport of the clause and the apparent intent of the testatrix in the ultimate disposition of the fund.

There being no other party to claim an interest in the income, as income, and no apparent intent that the principal should be broken, or the trust in any part terminated, until the death of both of the beneficiaries for life, it seems to follow that the entire income should be paid to the survivor. *Begley* v. *Cook*, 3 Drew. 662. *Pearce* v. *Edmeades*, 3 Y. & Col. Exch. 246.

Instructions accordingly.

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PHINEAS STOWE *vs.* BENJAMIN B. BOWEN, administrator.

A. executed an invalid deed, conveying his money, which was in B.'s possession, to B., C. and D., to invest and hold on certain trusts. B. paid the money to C. in presence of D., who advised and acted with B. and C. in the future administration of the trust but never had possession of any part of the fund. *Held*, that D. was not liable to A. for the fund as for money had and received by him to A.'s use, in the absence of fraud on his part and of any agreement by him to be jointly responsible with the other trustees.

The objection that a defence is not open to a defendant under his answer must be deemed to have been waived, if first made at the hearing of exceptions to a ruling on evidence introduced in support of such defence without objection at the trial on a review of a cause in which the original judgment was entered on default.

WRIT OF REVIEW. The original action was brought in 1862, in the superior court, by Edwin V. Reed, as special administrator of the estate of Christian Albee, against William L. Brown, Nathaniel Francis and Phineas Stowe, for money had and received by them to the plaintiff's use. Brown, who was an attorney at law, appeared for all the defendants, and filed an answer denying that Albee was dead, and that the plaintiff was administrator, alleging that the court had no jurisdiction of the cause, as the whole transaction to which it related concerned a trust, and that the only transaction which the defendants ever had with Albee was as trustees in a deed of trust executed by him, a copy of which was set forth; further alleging performance of the trust; setting up also the statute of limitations; and concluding with an averment that they did not owe the plaintiff anything. Brown died while the action was pending. No other counsel appearing in his stead, a default was entered and judgment taken against the defendants in 1863, which was the judgment sought to be reviewed.

The action of review was tried on the original pleadings, and a replication which alleged that the execution of the deed of trust set forth in the answer was procured by fraud and while Albee's mind was unsound. At the trial, in the superior court, before *Morton*, J., these facts appeared:

Albee was a sailor, born in Boston, where he resided when not at sea. In September 1852, he sailed from Boston for San Francisco, and he had not been heard from since August 12, 1853.

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In May 1861 the defendant in review was appointed administrator of his estate.

On May 23, 1851, Albee, with Brown, Francis and Stowe, had executed the deed of trust, which recited that he owned $1400, which he transferred to them as trustees, to pay his debts, invest the balance then remaining, and apply it to his support at their discretion, and on his death to pay to Brown's own use one third part of such sum as might then remain, another third to Stowe, who was pastor of a Seamen's Baptist Bethel, to be applied to promoting the Christian welfare of sailors, and the remaining third to Francis, to be applied to charitable purposes at his discretion.

The trust fund was at that time in the hands of Brown, and was then paid over by him to Francis, and invested in notes secured by mortgage, and held thereafter by Francis. Stowe accepted the trust, and advised and acted with the other trustees; but it did not appear that any of the fund ever came into his personal custody, although he was present when it was paid over by Brown to Francis, and was consulted and gave advice as to its investment, and as to the final disposition of the notes.

Several hundred dollars of the trust fund were expended for the support of Albee; and the defendant in review claimed to recover the balance, and offered evidence tending to show want of mental capacity in Albee prior to, and at the time of, the execution of the deed of trust, and that such incapacity continued to the time of his death; and also offered evidence tending to show that Albee was induced to execute the deed by false and fraudulent representations made to him by Brown, as to the existence and condition of a niece, Albee's only living relative, who was the wife of the defendant in review. But "it was not claimed by the defendant in review that either Stowe or Francis were guilty of any fraud or concealment whatever in the premises."

The plaintiff in review requested the judge to instruct the jury, "that, if the trust deed was void from, or could be avoided on the ground of, fraud practised at the time of, or before, its

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execution, in which Stowe had no part, and of which he had no knowledge, and the trust fund named in said deed came into the custody of one or both of his cotrustees, Stowe could not be held liable in this action for the same, unless the money or some part of it actually came to his personal possession." The judge refused this request, and submitted the case to the jury with the instruction, among others which are now immaterial, "that if they were satisfied that Albee was induced to execute the trust deed by false and fraudulent representations made by Brown, though without any participation or knowledge of the other persons named as trustees therein, and that the fraud was concealed from Albee, so that he did not discover it until within six years of his death, the deed would be void, and the defendant in review could maintain his action."

The jury returned a verdict for the defendant in review; and the plaintiff alleged exceptions.

C. R. Train & S. A. Bent, for the plaintiff in review.

E. Avery, for the defendant in review.

Colt, J. The original action is for money had and received, founded upon that implied promise which the law raises upon proof of certain existing relations between the parties. It is sought to be maintained here by proof that the plaintiff in review had received the money of the defendant's intestate which in equity he ought to refund.

The plaintiff in review is named as trustee jointly with Francis and Brown in a deed of trust which purports to have been executed by the intestate, the validity of which seems to have been the question mainly considered at the trial. The statute of limitations was also relied on in defence. And these matters chiefly occupied the attention of the judge in his instructions to the jury. It is unnecessary to review the instructions actually given, because we think the present plaintiff entitled to the instruction requested, but not given, in relation to the actual receipt by him and possession of the money of the intestate.

As a general rule, cotrustees are responsible only for their own acts. They may, by agreement to that effect, or by coöperation with or connivance in the act of another in violation of the

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trust, become themselves in one sense responsible for the act of a cotrustee. In the discharge of their trust, they must join in giving receipts and discharges for money paid them; but such joint receipts are open to explanation, and those only into whose actual possession and control the money has come will be liable for its subsequent misapplication. It is said that this rule does not apply to executors whose concurrence in acts relating to the estate is not necessary. Hill on Trustees, 471, note. *Kip* v. *Deniston*, 4 Johns. 23. *Leigh* v. *Barry*, 3 Atk. 584. *Sadler* v. *Hobbs*, 2 Bro. Ch. 117.

The nature of the action requires this defendant to prove that the plaintiff Stowe had actually received the money of his intestate. Stowe acted in the matter solely in his capacity as trustee under the deed, without knowledge of its alleged invalidity.

It appeared that he never took any of the trust funds into his actual custody. They were transferred from Brown to Francis in his presence, and he accepted the trust and advised and acted with them, but nothing more. It is conceded that he was not guilty of any fraud or concealment whatever in obtaining the transfer of the funds or the deed of trust. He cannot therefore be charged as coöperating with Brown in the alleged fraud. The jury found the deed void, either because Albee was insane, or because it was obtained by fraud practised by Brown. Upon either ground, it was therefore necessary for them to find, under proper instructions, that Stowe actually received the money, before their verdict could be against him. He cannot be placed in a worse position than if the deed had not been impeached for the fraud of Brown or the want of capacity in Albee.

The defendant in review now insists that the plaintiff Stowe has admitted the receipt of the money in his original answer in the case. The answer, which was joint, sets up many distinct grounds of defence, alleges that the only transaction whereby they had any money of the intestate arose under the deed of trust, and concludes with the averment that they do not owe the plaintiff anything. The question whether this answer, as it is

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and without amendment, is not sufficient to admit the defence, we do not discuss, for the objection, if it is valid, now comes too late. It does not appear to have been made at the trial. The instructions asked for were not objected to or refused on that ground. If they had been, the plaintiff would have had an opportunity to amend his answer. The doctrine of waiver applies, and we think he cannot now be deprived of this ground of defence. *Burke* v. *Savage*, 13 Allen, 408. *Jones* v. *Sisson*, 6 Gray, 294. *Hutchinson* v. *Gurley*, 8 Allen, 23. Gen. Sts. *c.* 146, § 30. *Exceptions sustained.*

ANN M. HUBERT *vs.* JOHN G. FERA.

In an action by a married woman, it is not necessary to allege her right to sue as such in the writ or declaration.

At the trial of an action for board of the defendant's wife after her desertion of him which is sought to be justified on the ground of his cruelty, the record of the dismissal, after a hearing of both parties on the merits, of a libel for divorce, which, after such desertion, she brought against him for the same acts of cruelty, is not conclusive of the facts then at issue.

CONTRACT by the keeper of a boarding-house on an account for board and lodging furnished by the plaintiff to the defendant's wife. Trial in the superior court, before *Wilkinson*, J.

Objection having been taken in the answer that the plaintiff was a married woman and had not alleged in her writ or declaration that the cause of action was a matter having relation to her separate property or business, the judge ruled that it was sufficient if the plaintiff's right to sue on the Gen. Sts. *c.* 108, § 3, was proved, without such an allegation.

One of the grounds of defence was, that during the time covered by the account the defendant's wife had deserted him and was living apart from him, without cause, and with the plaintiff's knowledge. The fact of the desertion was admitted by the plaintiff; and there was evidence tending to show the plaintiff's knowledge of it; but the plaintiff contended that the de-

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sertion was caused and justified by cruel and abusive treatment of the husband, and introduced evidence to that effect. It was also admitted that, after deserting her husband, the wife brought a libel here against him for a divorce from bed and board for the same acts of alleged cruel and abusive treatment which were relied on by the plaintiff, and that this libel was dismissed after a hearing of both parties on the merits. The defendant asked the judge to rule that the decree dismissing the libel was conclusive in this action of the facts then at issue; but he refused so to rule.

The jury found for the plaintiff; and the defendant alleged exceptions.

S. J. Thomas & L. S. Dabney, for the defendant.

C. Cowley, for the plaintiff.

Foster, J. 1. When a suit at law is brought by or against a married woman, for a cause of action to which she is entitled, or for which she is liable, under our statutes it is not necessary to allege in the writ her marriage and that the subject matter of the suit was her sole and separate property or services. It is sufficient if the facts disclosed at the trial establish her right to recover, or her liability on account of her separate property. *Van Buren* v. *Swan*, 4 Allen, 380. *Robbins* v. *Potter*, 11 Allen, 588; *S. C.* 98 Mass. 532. Even at common law the rule was the same. "Where the *feme* was interested before or during her coverture in the subject matter of the action, and might join with the husband, but sues alone, her coverture can only be pleaded in abatement, and cannot be given in evidence under the general issue or pleaded in bar." 1 Chit. Pl. (11th Am. ed.) 449.

2. The record dismissing the libel *a mensâ* between husband and wife was not conclusive in favor of the husband in the present case. It did not show that he was not liable for the necessaries furnished by the plaintiff to his wife while she was living separate from him. This point was expressly adjudged in *Burlen* v. *Shannon*, 3 Gray, 387. For two plain reasons this is so: first, the libel was not a suit between the same parties; second, a wife may be living separate from her husband under such circumstances that he is liable for her support, although he is not

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guilty of desertion, cruelty, or anything else for which she could obtain a divorce *a mensâ* against him.

Exceptions overruled.

CAROLINE W. BURLEN *vs.* OLIVER N. SHANNON.

A verdict and judgment are conclusive by way of estoppel only as to facts without the existence and proof or admission of which they could not have been rendered.

At the trial, with a jury, of a libel for divorce, their special findings on questions of fact are not conclusive of facts not essential to, although consistent with, their general verdict and the decree entered thereon.

At the trial, with a jury, of a libel, filed in Massachusetts, for a divorce for the cruelty and desertion of the libellee, he denied the charges, and set up his divorce from the libellant by a court of competent jurisdiction in Indiana; and she sought to impeach this divorce, on the grounds that he went to Indiana to procure it, and that he was not a citizen of Indiana when he there filed his libel. Special issues were submitted on these questions, and on the questions of cruelty and desertion, and findings made on each for the libellee; a general verdict was returned in his favor; and exceptions taken by the libellant were not sustained, the full court being equally divided. In an action here against the libellee for the board of the libellant subsequent to the Indiana divorce, *Held*, that the validity of that divorce was not established by the proceedings recited; and that the plaintiff might impeach it.

CONTRACT on an account, running from 1860 to 1866, for $3100, for board and lodging of Harriet M. Shannon as the wife of the defendant. Defence, that the defendant, in Indiana, in 1856, was lawfully divorced from Mrs. Shannon, to whom he was married in 1835. At the trial in the superior court, the defendant conceded that the plaintiff was entitled to a verdict if this defence should not prevail; *Morton*, J., ruled that the plaintiff was estopped from impeaching the divorce, and directed a verdict for the defendant; and the plaintiff alleged exceptions. The case is stated in the opinion.

J. S. Abbott, for the plaintiff.

E. D. Sohier & G. A. Somerby, for the defendant.

FOSTER, J.* In this action the plaintiff seeks to charge the defendant for the board of his wife from February 1860 to

* HOAR, J., did not sit in this case.

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February 1866. The defence relied upon is, that in the year 1856 the defendant was legally divorced from his wife by a court of competent jurisdiction in the state of Indiana. The record of that divorce was introduced; and also the record of a libel by the wife against the husband, filed in this court in 1861 and dismissed at April term 1865 for Suffolk, in which she claimed a divorce *a mensâ et thoro* for cruelty and desertion, and he denied the charges and also set up in defence the previous divorce *a vinculo* obtained in Indiana.

The learned judge at the trial ruled that the record dismissing the libel for divorce *a mensâ* was conclusive in favor of the validity of the Indiana divorce. He rejected the evidence proffered by the present plaintiff to show that the Indiana court had no jurisdiction over the wife, and held that the effect of the two proceedings together was, to establish conclusively the matrimonial *status* of the parties, and to relieve the defendant forever from all marital obligations subsequent to the Indiana decree.

The propositions to be maintained by the defendant, who supports this ruling, are: first, that even if the Indiana divorce were originally invalid the wife is now estopped to deny its validity, by reason of the proceedings in the libel *a mensâ;* second, that this supposed estoppel conclusively establishes the *status* of the parties as against all the world, and forever determines that the Indiana decree in 1856 did dissolve the marriage; third, that this estoppel relates back to the date of the Indiana divorce in such a manner as to bar and cut off the plaintiff's entire claim, most of which accrued before the date of the decree by which the estoppel is alleged to have been created.

In the libel *a mensâ*, the Indiana divorce was charged by the wife to be invalid because neither of the parties "has ever been domiciled in that state;" and the question of its validity was also distinctly presented by the answer of the husband, in which he pleaded the previous decree dissolving the marriage as a bar to the then pending application for a divorce from bed and board. Issues to the jury were framed, and at a trial in 1862 there was a general verdict for the libellee, together with specific findings in his favor upon all the issues which were propounded

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in the form of questions. By Gen. Sts. c. 107, § 15, "either party to a libel for divorce may demand a jury trial, whereupon the questions of fact arising upon the libel are to be so tried under the direction of the court, and a decree may be entered in conformity with the verdict." Under this form of proceeding it seems obvious that the rendition of a general verdict can add nothing to the weight of the specific findings. At the trial of the libel *a mensâ*, these were five in number. The first three negatived all the charges of misconduct contained in the libel; the fourth found that the libellee did not go to Indiana for the purpose of procuring a divorce; and the fifth found that he was a citizen of that state when he filed the libel there in which his divorce *a vinculo* was obtained. Upon the verdict on the first three issues it is manifest that the libel *a mensâ* must have been dismissed, whatever might have been the findings of the jury or the judgment of the court touching the validity of the Indiana decree. The libellant failed to prove any *delictum* against her husband. Inasmuch as he was found not guilty of either desertion or cruelty, it was impossible that any decree should be pronounced against him. How then can it be maintained that the decree in his favor by which this libel was dismissed conclusively establishes the validity of the Indiana divorce, when the same result must have been reached if no such record had existed?

The ground taken by the defendant is, that a general verdict and judgment are conclusive in favor of the prevailing party as to all issues actually involved in the trial, upon which any evidence was offered and which were submitted to the jury, although it may not appear that they were the very points on which the decision turned, and it may be doubtful in favor of which party any one of them was found, or even whether as to all of them the jury came to any conclusion. Such, however, is not in our opinion the true doctrine of the law. A verdict and judgment are conclusive by way of estoppel only as to those facts which were necessarily involved in them, without the existence and proof or admission of which such a verdict and judgment could not have been rendered. An estoppel is an admission or determination

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under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterwards drawn in question between the same parties or their privies. An estoppel by verdict and judgment is founded on the principle of the maxim, *Interest reipublicæ ut sit finis litium.* And the true limits of the doctrine are accurately stated in another maxim, *Nemo debet bis vexari* SI CONSTET CURIÆ *quod sit pro unâ et eâdem causâ.* When a fact has been once determined in the course of a judicial proceeding, and a final judgment has been rendered in accordance therewith, it cannot be again litigated between the same parties without virtually impeaching the correctness of the former decision, which from motives of public policy the law does not permit to be done. The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis on which it stands, "upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion." But such an inference must be inevitable, or it cannot be drawn. These we understand to be the limitations of the rule, according to all the well considered authorities, ancient and modern. 2 Smith Lead. Cas. 573 *et seq.* *Outram* v. *Morewood*, 3 East, 346. *The Queen* v. *Hartington*, 4 El. & Bl. 780. *Washington Steam Packet Co.* v. *Sickles*, 24 How. 333. *Packet Co.* v. *Sickles*, 5 Wallace, 580. *Dickinson* v. *Hayes*, 31 Conn. 417. *Church* v. *Chapin*, 35 Verm. 223.

Some imperfectly guarded expressions in *Jennison* v. *West Springfield*, 13 Gray, 544, are susceptible of a different construction. By reference to the bill of exceptions, we find that the defendants offered a former record between the same parties together with evidence that the only matter then in controversy was the settlement of a pauper; that this was by both parties conceded to be the only question submitted to the jury; and that all the evidence consisted of certain agreed facts and depositions. But the witness by whom this was proved added, that "he did not know of any formal abandonment of the other

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grounds of defence." The presiding judge ruled that the former judgment was neither conclusive nor admissible, unless there had been at the trial a formal abandonment of every other issue except the single one of the settlement of the pauper; and that the facts did not show an abandonment sufficiently formal; and therefore he rejected the record and the parol evidence offered therewith. This rule was held to be too stringent, and exceptions to it were sustained. This is the extent to which that case can be regarded as authority.

In *Sawyer* v. *Woodbury*, 7 Gray, 499, the opinion, by Shaw, C. J., expounds the law with fulness and accuracy; but the exceptions taken at a second trial were overruled without any statement of reasons, and we find it impossible to reconcile this final result either with the opinion or with sound legal principles. This circumstance has been noticed in *Perkins* v. *Parker*, 10 Allen, 22, in which it is said that the final disposition of *Sawyer* v. *Woodbury* must be assumed to have been intended to be in harmony with the opinion which had been previously announced, and which had recognized *Dutton* v. *Woodman*, 9 Cush. 255, and *McDowell* v. *Langdon*, 3 Gray, 513, as authorities. In the last case, it was directly adjudged that a verdict and judgment are not conclusive, unless it appears by the record, or by parol evidence in addition thereto, that the prevailing party in the former suit prevailed upon the very issue in support of which he offers the record in evidence. There the two cases were between the same parties, and of the same nature. In the first, the defendant pleaded not guilty to a charge of obstructing the flow of water to the plaintiff's mill, and also a right to use the water in the manner complained of. When he relied upon the record of the first judgment in his favor, as a bar to the second action for similar subsequent torts, it was left doubtful on which of the two grounds he prevailed at the former trial; and for this cause the court held that the plea could not be sustained.

In *Burlen* v. *Shannon*, 3 Gray, 387, and *Same* v. *Same*, 14 Gray, 433, (two former actions between these parties for a like cause with the present,) the true principle is distinctly recognized. Shaw, C. J., says: "It is only when a fact is specially

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put in issue, traversed and tried, that a verdict and judgment following it are evidence against a party." 3 Gray, 392. And in the later of the two cases, 14 Gray, 439, it was directly and explicitly decided that the former one, in which the husband was held liable to the present plaintiff for the board of his wife during a certain period of time, did not conclusively establish that his cruelty was the cause of her absence from his house during that time; since the action had been tried upon two issues; one that the husband was liable for the support furnished to his wife, because his cruelty justified her separation from him, and the other that he was liable because the separation was by his consent. The chief justice said: "The parol evidence was rightly admitted to ascertain what questions were in fact tried and submitted to the jury. This evidence showed that two such questions were submitted; that if either of two things were true they would return a verdict for the plaintiff. A verdict on that direction for the plaintiff proved nothing more than that the jury found one of the propositions true, but without finding which." 14 Gray, 439. The whole current of our own decisions fully supports the limitations of the doctrine of estoppel which we now sanction and adopt.

But the defendant further insists that in the libel *a mensâ* there were distinct and special findings by the jury, in answer to the fourth and fifth questions submitted to them, of the facts essential to the validity of the Indiana divorce; and that the decree dismissing the libel was a direct judgment upon these issues. There would be much force in this position, if there had been a common law verdict and judgment rendered upon such special findings. Although we are aware of no adjudged case which prescribes the effect to be attributed by way of estoppel to a judgment on a special verdict which ascertains various facts a part only of which would have been sufficient to determine the result of the action, yet in equity causes, probate appeals, and libels for divorce, issues to a jury differ widely from jury trials according to the course of the common law. At the common law, if a verdict is not set aside, judgment upon it is the immediate and necessary result, unless a motion in arrest

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of judgment is successfully interposed. In the other class of cases, the office of the verdict is to inform the conscience of the court. The final decree is the distinct and independent act of the chancellor or judge. The verdict is treated as weighty, but not always as conclusive, evidence. In England, and in many American courts, the verdict is sometimes wholly disregarded, and a decree is entered in opposition thereto, where the court is clearly satisfied that the verdict is contrary to the truth as established by the whole body of evidence in the cause. *Ansdell* v. *Ansdell*, 4 Myl. & Cr. 449. *Day* v. *Hartshorn*, U. S. District Court for R. I. 1855, before Pitman, J., quoting the opinions of Nelson, Curtis, Woodbury and Sprague, JJ. *Pike* v. *Potter*, U. S. Circuit Court, R. I. District 1859, before Clifford and Pitman, JJ. 2 Dan. Ch. Pr. (3d Am. ed.) 1115 & notes. "A verdict upon an issue ordered by a court of equity is in no just sense final upon the facts it finds, or binding upon the judgment of the court. The court may at its pleasure set it aside and grant a new trial, or, disregarding it, may proceed to hear the cause, and decide in contradiction to the verdict; or it may adopt the verdict *sub modo*, and give it a limited effect only." Per Story, J., in *Allen* v. *Blunt*, 3 Story, 746. This practice has never been sanctioned by the usage of our own courts; *Franklin* v. *Green*, 2 Allen, 522; but it illustrates the fact that the conclusiveness of verdicts in equity and the ecclesiastical courts is not regarded in the same light as in ordinary common law proceedings. There is an implied recognition of the difference, in the statute, as to trials by jury in divorce cases, the language of which is, that "a decree may be entered in conformity with the verdict."

We must examine the former decree in the light of these principles. And doing so, it is clear that when the court took the several findings of the jury into consideration, and dismissed the libel *a mensâ*, nothing more was determined than that, for one of two reasons, the libellant had failed to maintain her case. It is left wholly uncertain and unascertainable whether the libel was dismissed on the ground that no *delictum* or cause of divorce alleged against the libellee had been proved; or because

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there had been a previous dissolution of the marriage. This libel was twice before the court *in banc;* in January 1861, (*Shannon* v. *Shannon*, 4 Allen, 134,) when certain exceptions were sustained; and again, after a second trial, in November 1862. In January 1863 a rescript was entered: "The court being equally divided in opinion, the exceptions are not sustained." Upon examining the briefs at the last argument, we find that the counsel for the libellee insisted that, as "the jury had found for the defendant specially upon the main points in the case, the question in regard to the Indiana divorce was immaterial." This position seems to us to have been well taken. We cannot judicially know that the exceptions were not overruled as immaterial, and that the libel *a mensâ* was not dismissed because the libellee had been found not guilty. Under these circumstances, it is impossible to regard these proceedings as having established by estoppel the validity of the Indiana divorce. The ruling of the learned judge at the trial of the present action cannot therefore be maintained.

Considering the importance, delicacy and difficulty of the questions involved in this cause, we have been disposed to anticipate nothing, and have carefully confined our attention to the points immediately raised by this bill of exceptions. We have studiously refrained from considering whether the Indiana court had sufficient jurisdiction to warrant a decree of divorce which can be recognized as valid beyond the limits of that state, either on the ground that the domicil of the wife followed that of her husband and was transferred to Indiana when he removed there, although she remained in Massachusetts; or on the ground that the tribunals of a state in which the libellant alone is domiciled can dissolve a marriage. Nor have we examined the novel and curious questions, whether a divorce originally invalid can be made valid by subsequent proceedings between the parties creating an estoppel conclusive upon their matrimonial *status;* nor, if this could be done, whether such an estoppel would operate by relation, and destroy the claim of the present plaintiff for necessaries furnished to the wife before the decree creating the estoppel was rendered. *Exceptions sustained.*

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CHARLES A. LOUD & others *vs.* CITY OF CHARLESTOWN.

In this Commonwealth, the remedy at law of a person upon whom a tax is illegally assessed by a town or city is plain, adequate, complete and exclusive, in event of the collection of the tax; and this court has not jurisdiction in equity to restrain such collection.

BILL IN EQUITY by copartners, alleging that they were residents of Boston and had no taxable property in Charlestown, and seeking to restrain by injunction the collection of a tax illegally assessed on them by the defendants, who demurred to the jurisdiction. The case was reserved by *Wells*, J., on the bill and the demurrer, for the determination of the full court.

R. F. Fuller, for the plaintiffs, first called upon, cited *Shaw* v. *Becket*, 7 Cush. 442; *Toledo & Wabash Railroad Co.* v. *Lafayette*, 22 Ind. 262; *Calkin* v. *Cocke*, 14 How. 227: *Bailey* v. *Constables of Chorlton-upon-Medlock*, 3 Beav. 499, 503; *Supervisors of Albany County* v. *Durant*, 9 Paige, 182; *Dehon* v. *Foster*, 4 Allen, 545, 550; *Miller* v. *Gorman*, 38 Penn. State, 309; *Morris Canal & Banking Co.* v. *Jersey City*, 1 Beasley, 227; *Burnet* v. *Cincinnati*, 3 Ohio, 73, 88; *Betts* v. *Williamsburgh*, 15 Barb. 262.

N. St. J. Green, (*H. W. Bragg* with him,) for the defendants.

CHAPMAN, C. J. It has long been held in this Commonwealth that an action at law could be maintained against a city or town to recover back the amount collected by it upon an illegal assessment. See *Boston & Sandwich Glass Co.* v. *Boston*, 4 Met. 189. But our statutes have limited and regulated the remedy. Gen. Sts. *c.* 11, § 54; *c.* 12, § 56. And assessors are relieved from legal responsibility except for the want of integrity and fidelity on their own part. Gen. Sts. *c.* 11, § 51. *Durant* v. *Eaton*, 98 Mass. 469. The legislature has evidently regarded this remedy as adequate and complete, having regard to the necessity of a prompt and unembarrassed assessment and collection of taxes for the maintenance of the government.

This court has full equity jurisdiction, according to the usage and practice of courts of equity, in certain enumerated cases,

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and in all other cases where there is not a plain, adequate and complete remedy at law. The usage and practice referred to is not, however, that of other states where it has been enlarged by statutes, but that which courts of equity are accustomed to exercise, without the aid of such statutes, as coming within the general scope of the principles of equity.

Several cases are cited on behalf of the plaintiffs, in which the courts of some of the states have interfered by injunction to restrain the assessment and collection of illegal taxes. But in *Greene* v. *Mumford*, 5 R. I. 472, the subject was thoroughly discussed, and the court refused to interfere, on the ground that, if the tax was illegal, the party had a remedy at law which was sufficiently adequate and far more consonant with the scope and provisions of the tax act. The English courts of equity, to which our ancestors were subject, and from which our usage and practice is mainly derived, do not appear to have exercised jurisdiction in such cases. By Gen. Sts. *c.* 12, § 42, this court has jurisdiction in equity in certain cases in respect to the redemption of real estate sold for payment of taxes. If the legislature had intended to give parties further remedies in equity in respect to taxation, they would have been likely to make express provisions on the subject, with proper limitations.

Demurrer sustained.

ROBERT H. CLOUSTON *vs.* JOSEPH SHEARER.

A person in possession of land, and taking the rents and profits, may, notwithstanding the Gen. Sts. *c.* 134, §§ 49, 50, maintain a bill in equity to quiet his title, against one who, as to him, is dispossessed and disseised, but asserts an adverse title under a mortgage the validity of which is denied by the plaintiff.

BILL IN EQUITY to quiet the plaintiff's title to land in Roxbury. The defendant demurred to the jurisdiction, and argued that the plaintiff's remedy was plain, adequate and complete, under the Gen. Sts. *c.* 134, §§ 49, 50. The case was reserved

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by the chief justice, on the bill and the demurrer, for the determination of the full court, and is stated in the opinion.

G. W. Park, for the defendant.

J. P. Converse, for the plaintiff.

CHAPMAN, C. J. As the case comes before us on demurrer to the plaintiff's bill, the allegations of the bill must be taken to be true. The object of the bill is, to remove a cloud from the plaintiff's title to certain real estate. He derives his title from Charles Redding, who conveyed to Peter Goodnow, by deed of warranty, August 13, 1861, subject to a mortgage to Eliza D. Bryant, dated April 1, 1861. Peter Goodnow conveyed to the plaintiff June 16, 1863. On the 1st of July 1861, the right of Charles Redding was attached on mesne process by Bradford S. Farrington, deputy sheriff. Execution was issued in the suit January 27, 1862. Farrington sold the right to redeem Bryant's mortgage to George Curtis, July 24, 1862; and Curtis conveyed his interest to Peter Goodnow November 13, 1862. These conveyances apparently make a good title in the plaintiff.

The cloud consists in this: On the 27th of July 1861, which was a short time before the conveyance of Charles Redding to Peter Goodnow, Redding executed a mortgage of a part of the land to John Downey, to secure the sum of $500. On the 30th of February 1863, Downey assigned this mortgage to Mary Ann H. Redding, the wife of Charles. On the 18th of November 1863, she undertook to sell the mortgaged property to Wellington Welch by virtue of a power of sale contained in the mortgage. But the execution of the power being defective, as was supposed, she again sold it to George W. Park, October 5, 1865; and Park conveyed it to the defendant, November 1, 1865.

The bill alleges that Goodnow entered and took possession, and he and the plaintiff have ever since held possession; that they were ignorant of the mortgage to Downey; that the mortgage was without consideration and fraudulent, and nothing is due upon it; and that the defendant has demanded of the plaintiff's tenants that they pay rent to him, he claiming title under the mortgage adversely to the plaintiff.

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The mortgage gives the defendant an apparent title which is older than that derived by the plaintiff from Charles Redding's deed to Goodnow; and the defendant uses it to contest that title and also the title derived from the sale of the equity on execution. Therefore it is a cloud upon the plaintiff's title, which exposes him to litigation, and may continue to expose him to litigation after the evidence to contest it shall have been lost. It may also affect the market value of the land, and might prevent him from enforcing specifically a contract for the sale of it.

The power of a court of equity to remove a cloud which rests upon the title to real estate, in a proper case, is well established. Story Eq. (8th ed.) §§ 439, 694, 700, 705, and authorities cited. *Pettit* v. *Shepherd*, 5 Paige, 501. *Carroll* v. *Safford*, 3 How. 463.

This court has exercised such power. In *Pierce* v. *Lamson*, 5 Allen, 60, a bill was maintained for the surrender of a mortgage which had been obtained by fraud and was a cloud on the title. In *Martin* v. *Graves*, 5 Allen, 601, a bill was maintained for the cancellation of a fraudulent deed, and the principle was stated by Merrick, J., as follows: "Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and cancelled, or by making any other decree which justice and the rights of the parties may require." This is a broad and comprehensive statement of the principle on which such relief is given. When the plaintiff can obtain a plain, adequate and complete remedy by an action at law in any form, a bill in equity will not lie; and there are several cases where bills have been dismissed on the ground that such remedy existed. *Pratt* v. *Pond*, 5 Allen, 59. *Clark* v. *Jones*, Ib. 379. *Mill River Loan Fund Association* v. *Claflin*, 9 Allen, 101. *Commonwealth* v. *Smith*, 10 Allen, 448. We are then led to the inquiry whether the plaintiff in this case has, upon the allegations of his bill, a remedy at law.

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The plaintiff alleges that he and his grantors have been in possession of the land, taking the profits; that he is now in possession, and the defendant has never had possession. The defendant demanded rent, but the plaintiff's tenants have not yielded to his demand, and they remain in possession under the plaintiff, and the defendant is held out and disseised. Thus it does not appear that the acts of the defendant are sufficient to constitute a disseisin of the plaintiff, even by election, unless the defendant should elect, in a writ of entry, to plead *nul disseisin*, which would be an admission of his seisin. But he would not be obliged to plead thus. He might plead, either in abatement or in bar, that the demandant himself was seised on the day of the purchase of the writ, and thus defeat the action. Or if, while the suit was pending, the plaintiff should do any acts inconsistent with the pursuit of his remedy, such acts might be pleaded in abatement. Thus, if he were to enter and collect rents, or take the profits in any way, the defendant, as tenant in the action, might plead that he had entered and disseised him pending the suit. Entry into a parcel of the demanded premises would abate the whole writ. Roscoe on Real Actions, 203, 204. Com. Dig. Abatement, F, 16; H, 48. Jackson on Real Actions, 102, 165, 166. Therefore a writ of entry in favor of a party in possession of land and taking the rents and profits, against one who is as to him dispossessed and disseised, cannot be regarded as a complete remedy for quieting the adverse title. Even if his adversary does an act which may amount to a disseisin by election, he must abandon his possession during the pendency of the suit, though the premises be his homestead, or his action may be defeated by a plea in abatement.

It is only when he is not taking the profits that the remedy at law is adequate, and this is the class of cases in which it has been held that a bill in equity will not lie.

In 1852, when the equity jurisdiction of the court was limited, the legislature passed an act, St. 1852, *c.* 312, § 52, which is now contained in the Gen. Sts. *c.* 134, §§ 49, 50, providing that any person in possession of real property, claiming an estate of freehold, &c., may file a petition in the supreme judicial

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court against an adverse claimant who is not in possession, praying that he may be summoned to show cause why he should not bring an action to try the alleged title. Upon notice being given, the court may hear the parties and make such decree respecting the bringing and prosecuting of such action as may seem equitable and just. But the statute has been construed strictly. See *Hill* v. *Andrews*, 12 Cush. 185; *Dewey* v. *Bulkley*, 1 Gray, 416; *Macomber* v. *Jaffray*, 4 Gray, 82; *Munroe* v. *Ward*, 4 Allen, 150. And by the terms of the statute the right of the petitioner is not absolute, but is subject to the discretion of the court; and, at best, it is not immediate, but subject to delay. The court are of opinion that the remedy under this statute is not so adequate and complete as to supersede the remedy in equity. *Demurrer overruled.*

FRANKLIN EVANS *vs.* CHARLES H. BACON & others.

A bill in equity to annul a decree obtained in fraud of the plaintiff ought ordinarily, by analogy with the period fixed by statute for the suing out of writs of review as of right, or the filing of petitions for review of judgments in civil actions, (Gen. Sts. c. 146, §§ 20, 21,) to be filed within one year from his discovery of the fraud.

A plaintiff in a bill in equity to redeem land, who, on discovering upon the docket the entry of a decree dismissing his bill, files a petition to annul it, which after a hearing of the parties is denied, cannot maintain a bill, which he delays, without explanation, to file until two years and four months afterwards, to set aside the decree on the ground that it was obtained by fraud, but must be deemed to have waived his rights in that respect, although it does not appear that his petition was not dismissed for mere defect of form.

BILL IN EQUITY filed February 27, 1867, to annul, on the ground of fraud, a decree entered on the docket April 7, 1862, dismissing a bill in equity of this plaintiff against the principal defendant to redeem land; and to procure a rehearing of that cause. The answers denied fraud, and alleged, among other defences, that the plaintiff was barred by laches from any remedy on this bill.

At the hearing, before *Wells*, J., who reported the case for the determination of the full court, it appeared that in the cause in

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question there was no memorandum of any decree or order of the court other than the entry "dismissed" upon the docket; and "no evidence nor explanation was given as to the manner in which this entry was caused to be made, except that the clerk stated his impression to be that it was made by him upon the suggestion of the defendant's counsel that it was correct." It further appeared that neither the plaintiff nor his counsel in the cause had ever any notice of any motion to dismiss the bill, nor until in July 1864 any knowledge that it had been dismissed; that in October 1864 the plaintiff filed a petition to set aside the decree of dismissal, which petition was refused by *Chapman*, J., after a hearing of both parties; and that there was nothing on the records of the court relative to that hearing.

G. A. Somerby & L. S. Dabney, for the plaintiff.

S. J. Thomas & G. E. Betton, for the defendants.

Foster, J. In the view which the court have taken of this case, it is unnecessary to decide whether the present bill is to be regarded as one to impeach a decree for fraud, which it is said may be filed without leave of court; Adams Eq. 419; or as a bill of review, which, when not founded upon error in law apparent on the face of the record, can be filed only upon leave granted. *Elliot* v. *Balcom*, 11 Gray, 286.

The complaint of the plaintiff is, that in the original suit brought by him an entry of "bill dismissed" was improperly and fraudulently procured by the defendants. This entry was made April 7, 1862. In October 1864, a petition to have the decree set aside was heard and denied. The present bill was filed February 27, 1867. The hearing in October 1864 must be taken to have established the fact that the decree was not a mere nullity, or a fraud upon the court which regard for its own dignity and the due administration of justice requires should be expunged from the record. If such were its character, the summary application heard before Mr. Justice Chapman must have prevailed. The question then is, whether the entry was a fraud upon the plaintiff in consequence of which he can now review or impeach the decree by the present bill.

A fraudulent act is binding upon the party by whom it is

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committed, and voidable only at the election of the party defrauded. The right of the party injured to rescind a fraudulent transaction is one which may be waived, and which will be lost by immoderate delay in its exercise. It remains only for a reasonable time after the discovery of the fraud. This rule is founded upon the plainest principles of justice, and seems to be of universal application.* The present question is, whether the right to vacate the original decree of "bill dismissed" is one to which the plaintiff continued entitled for so long a period as two years and four months after the application before Mr. Justice Chapman had been denied. If that refusal was based upon the merits, and the plaintiff nevertheless insists that it is not conclusive, surely great promptness should be exacted of him in instituting the present proceeding. If the failure of that petition was caused by defect in form, it was still incumbent on the plaintiff, if he did not intend to acquiesce in the result, to try the present remedy without delay. It was important to the defendant to know whether he was to be allowed to become the undisturbed owner of the estate, the title of which was in litigation, or whether redemption or equitable relief from forfeiture was still claimed to exist.

It is true there is no statute of limitation fixing a precise period of time after which the right to file a bill like the present is barred. But the limitation of a year for writs of review affords a close and forcible analogy. *Plymouth* v. *Russell Mills*, 7 Allen, 438. No reason is assigned and no excuse is offered for a greater delay in the present instance. And, without laying down any inflexible rule, the court are all of opinion that one year after the discovery of the alleged fraud is a period beyond which the right to file such a bill as the present ought not ordinarily to be allowed; and that the particular facts of this case furnish no reason for enlarging the time.

Bill dismissed.

* See *Clarke* v. *Dickson*, El., Bl. & El. 148, and *Oakes* v. *Turquand*, Law Rep. 2 H. L. 346.

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William Carleton & others *vs.* Franconia Iron and Steel Company.

The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of.

The owner of a wharf procured a vessel to bring a cargo to it to be there discharged, and suffered her to be placed there, at high water, over a rock sunk and concealed in the adjoining dock. Of the position of the rock and its danger to vessels he had long been aware, but gave no notice thereof to the owners of the vessel or any one in their employment. Without negligence on their part, the vessel settled down upon the rock, with the ebb of the tide, and was bilged by it. *Held*, that he was liable in damages, whether or not he owned the soil of the dock, and whether or not his wharf was a public wharf.

Tort for injury of the plaintiffs' schooner by being sunk and bilged in the dock adjoining the defendants' wharf in Wareham. The case was reserved by *Wells*, J., for the determination of the full court on facts found by him without a jury, those which are material to the decision being as follows:

The defendants owned and occupied a wharf fronting on navigable waters in Wareham River, where the tide ebbed and flowed; and in 1864 extended it and built a sea wall along its outer edge below low water mark, excavating the bed of the river, along the whole length of the wharf, to lay the foundation of the wall, and dredging a space, between twenty and thirty feet wide, in front of the wall, for berths for vessels, which were accustomed to come to the wharf with cargoes of iron and coal for the defendants' foundries, which were situated on the wharf and fenced in on the land side. There was no other proof of any ownership in the dock by the defendants.

There was and always had been in the bed of the river, within the space dredged by the defendants, and opposite to a part of the wharf which was apparently suitable for vessels to lie at, "a large rock, sunk in the water and thereby concealed from sight, dangerous to vessels, and so situated that a vessel of the draft to which the water at said wharf was adapted, being placed

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at high water at that part of said wharf, would lie over said rock, and by the ebb of the tide would settle down and rest upon the same;" and the defendants had notice of the existence and position of this rock and of its danger to vessels, (the same having been pointed out in 1864 to John Billings, their general agent and superintendent, who had charge of the wharf and works, and of hiring vessels and receiving their cargoes,) but neglected to place any buoy or other mark upon the rock, or to give any notice of it to the plaintiffs, or to any one in the plaintiffs' employment, at or before the time of the injury which was the subject of the action.

The plaintiffs' vessel came to the wharf in 1866, by procurement of the defendants, bringing a cargo of iron for them under a verbal charter entered into between Billings in their behalf and the master of the vessel in behalf of the plaintiffs, and was placed at the wharf, at the time of high water, over the rock, of the existence of which neither the plaintiffs nor any one in their employment had any knowledge, and, without any negligence on their part, settled down upon the rock, with the ebb of the tide, and so was bilged.

W. G. Russell, for the plaintiffs.

T. M. Hayes, for the defendants.

Gray, J. The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of. The general principle has been so fully discussed in the recent judgments of this court in *Sweeny* v. *Old Colony & Newport Railroad Co.* 10 Allen, 368, and *Elliott* v. *Pray*, Ib. 378, that but two or three additional cases need be cited by way of illustration.

In *Wendell* v. *Baxter*, 12 Gray, 494, the proprietors of a wharf, established for the use of the public, were held to be liable for an injury resulting from a defect in its surface, whether occasioned by the action of the sea or by other causes, which they

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by the exercise of ordinary care and diligence could have provided against, to a person rightfully on the wharf with his horse and cart for the purpose of carrying mail bags from a steamboat to the post-office. In *Parnaby* v. *Lancaster Canal Co.* 11 Ad. & El. 223, the courts of queen's bench and exchequer chamber held that the proprietors of a canal, authorized by law to keep it in repair and to take tolls thereon, were liable at common law for an injury occasioned to a boat, navigating the canal, by striking against another boat, which had sunk in the canal, and which they had negligently omitted to raise, or to indicate the position of by appropriate signals. *S. C.* 3 N. & P. 523, and 3 P. & D. 162. So a corporation, authorized to repair certain docks and to receive tolls for the benefit of the public, was held by the exchequer chamber and the house of lords to be responsible for an injury suffered by a vessel, entering one of the docks, by coming in contact with a bank of mud which it had negligently permitted to accumulate at and about the entrance. *Gibbs* v. *Trustees of Liverpool Docks*, 3 H. & N. 164. *S. C. nom. Mersey Docks Trustees* v. *Gibbs*, 11 H. L. Cas. 687, and Law Rep. 1 H. L. 93. In the judgment of the exchequer chamber in the last case, it was said that, even if the defendants, knowing of the danger, were not bound to remove it, they ought at all events to have closed the dock to the public, and had no right, with a knowledge of its dangerous condition, to keep it open and to invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, on payment of the tolls to them, might enter and navigate the dock. 3 H. & N. 176. See also *Indermaur* v. *Dames*, Law Rep. 1 C. P. 274; *S. C.* 2 Ib. 311; *Thompson* v. *North Eastern Railway Co.* 2 Best & Smith, 106.

The report in this case finds that the defendants built, owned and occupied a wharf extending below low water mark into public navigable waters, and excavated and used a dock in front of the same as a berth for vessels, bringing cargoes of iron and coal to their works on and adjoining the wharf, to lie at and discharge; that there was and always had been, within the line of this excavation, and in front of a part of the wharf which was

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to all appearance suitable for vessels to lie at when discharging their cargoes, a large rock, concealed under the water and dangerous to such vessels, the existence and dangerous nature of which were known to the defendants, but not to the plaintiffs; that the plaintiffs' vessel came to the wharf by procurement of the defendants, bringing a cargo of iron to them under a verbal charter between the parties, and, while lying at this part of the wharf, settled down with the ebb of the tide upon the rock, without any negligence of the plaintiffs or of any one employed by them, and was broken in and bilged.

It does not indeed appear that the defendants owned the soil of the dock in which the rock was imbedded; but they had excavated the dock for the purpose of accommodating vessels bringing cargoes to their wharf; and such vessels were accustomed to occupy it, and could not discharge at that point of the wharf without doing so. It is immaterial in this case whether the danger had been created or increased by the excavation made by the defendants, or had always existed, if they, knowing of its existence, neglected to remove it or to warn those transacting business with them against it. Even if the wharf was not public but private, and the defendants had no title in the dock, and the concealed and dangerous obstacle was not created by them or by any human agency, they were still responsible for an injury occasioned by it to a vessel which they had induced for their own benefit to come to the wharf, and which, without negligence on the part of its owners or their agents or servants, was put in a place apparently adapted to its reception, but known by the defendants to be unsafe. This case cannot be distinguished in principle from that of the owner of land adjoining a highway, who, knowing that there was a large rock or a deep pit between the travelled part of the highway and his own gate, should tell a carrier, bringing goods to his house at night, to drive in, without warning him of the defect, and who would be equally liable for an injury sustained in acting upon his invitation, whether he did or did not own the soil under the highway.

This view being conclusive of the defendants' liability, it is

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unnecessary to consider whether the stevedore who placed the vessel in this berth was the agent of the plaintiffs or of the defendants. *Judgment for the plaintiffs.*

Charles H. Gass & another *vs.* New York, Providence & Boston Railroad Company.
Charles H. North *vs.* Same.

Three common carriers ran lines of steamboat or railroad transportation, each covering a part only of a certain route, which formed together a continuous line of through transportation of goods over that route. A rate of freight fixed by mutual agreement was charged for the through service, collected by the carrier whose line included the end of the route, and divided between the three in an agreed proportion. *Held*, that no partnership or joint liability to shippers of goods was created by these facts.

A steamboat connected with a railroad at a wharf owned by the proprietors of the latter; and the railroad connected elsewhere with another railroad, the three forming a continuous line of through transportation of goods. Upon the arrival of the steamboat at the wharf, with goods for through transportation, a list of them, made up from the freight book of the boat, was delivered by the clerk of the boat to the agent of the first railroad, to be forwarded by an early train to the agent of the second railroad at the end of the line, for the purpose of making out and having ready there the consignees' bills of the goods upon their arrival by a later train, which soon afterwards was run down upon the wharf on a track near to the berth of the boat. The employees of the boat and those of the railroad, in equal numbers, then acted in concert in transferring goods from the boat to the cars, partly by hand and partly on trucks some of which belonged to the boat and some to the railroad; all of them sharing both in the removal of goods from the boat to the wharf, and their further removal across the wharf into the cars; and no account was kept by any one of goods delivered by the boat or received by the railroad. While they were thus engaged, and before all of the goods had reached the wharf, a fire broke out which stopped the work and destroyed the boat, wharf, cars and all the goods. *Held*, that the railroad was not liable to the shippers for any of the goods destroyed upon the boat.

Two actions of contract, for the value, in the first case, of one hundred and fifty-six tubs of butter, and in the second case of twenty-five tierces and two hundred cans of lard, alleged to have been delivered by the plaintiffs respectively to the defendants as common carriers, for transportation over a route between New York and Boston, of which the defendants' railroad formed a part. At the trial, before *Foster*, J., these facts appeared:

The defendants' railroad, which extends from Groton in Con-

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necticut to Providence in Rhode Island, connected at Groton with steamboats of the Merchants' Navigation and Transportation Company, which ply between Groton and New York, and at Providence with the railroad of the Boston and Providence Railroad Company, which extends from Providence to Boston. The three lines formed together a continuous line of transportation of passengers and goods between New York and Boston, called the Stonington Line. By an arrangement between the three corporations, fixed rates were charged for the through transportation of goods and passengers; the entire freight on goods transported from New York to Boston was collected at the end of the route in Boston, by the Boston and Providence Railroad Company; and an account was kept thereof, and the receipts were divided in a fixed proportion between the several corporations.

At the end of their road in Groton, the defendants owned a wharf, on which were their stations for passengers and freight, and to which the steamboats of the Merchants' Navigation and Transportation Company came from New York. Upon one of these steamboats, named the Commonwealth, the plaintiffs, on December 28, 1865, caused the goods described in the declaration to be shipped for Boston, without any bill of lading or special contract of any kind. The boat arrived at the wharf at Groton about twenty minutes before midnight. The passengers and their luggage were immediately transferred to a train of cars which left for Boston shortly after midnight; the crew and deck hands of the boat then were served with a meal, as usual; and while they were engaged at the meal, the defendants' employees prepared a train of freight cars and moved it down upon a railroad track not more than seventy feet distant from the boat, and from which sheds extended down to both of the boat's gangways.

On the passage of the steamboat from New York to Groton a list of the Boston freight was made up, as usual, from the freight book of the boat, to be forwarded to Boston by the passenger train, so as to enable the clerks of the Boston and Providence Railroad Company at Boston to make out and have ready for the consignees of the goods at Boston bills thereof upon the

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arrival there of the freight train, which usually started from Groton about four o'clock in the morning, or four hours after the departure of the passenger train. This list, on which the plaintiffs' goods, together with numerous others shipped in like manner on the boat, were entered and described, was delivered, on the night in question, by the clerk of the steamboat to the defendants' agent in his office at the station, about five minutes after the boat reached the wharf; and was unsigned, entitled "Steamer Commonwealth for freight from New York for Boston December 28, 1865," and made up in six columns, headed respectively Merchandise, Destination, Consignees, Weight or Measure, Amount Freight, Expenses Paid. The articles of each shipment of the plaintiffs bore the initials or other marks of the plaintiffs respectively, and were so designated on the list.

After the hands on the boat had finished their meal, which occupied from ten to fifteen minutes, the discharge of goods from the boat and the loading of the freight train was begun. It was agreed or was proved at the trial "that the steamboat company kept and employed no men at the terminus or depot at Groton, who had anything to do with the unloading or loading of goods; that the defendants employed and kept there for this and other service from twenty to thirty men, who were engaged in different positions; and the boat had on board, who came in her from New York, eighteen men of the crew and deck hands, who loaded freight in New York, who were engaged in the same service with the defendants' men at Groton; that the boatmen did not discharge and remove the goods from the boat on to the wharf, and deliver at any particular place or point, and the defendants there take them and load them into the cars; but the arrangements, course of proceeding and practice between the parties, and which they pursued that night, were as follows:

"The defendants had in the depot some twenty trucks or upwards, and their said men went on and into the boat with their trucks, and took goods at the place where they were and had been originally stowed, and carried the goods either by hand, or rolled them on trucks, from that place off the boat, and into the

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cars where they were placed to make up the freight train. The boatmen took trucks and engaged in like service. The goods were usually taken from one of the guards on one side of the boat by the railroad men, and by the boatmen from the other side. If the defendants had the most men, some of them were placed with the boatmen. When the guards were cleared, the men went together to the other parts of the boat. One of the mates was on board attending to the discharging. There were three boatmen on each side of the boat acting as stevedores, under the direction of the mate, as testified by him, who broke out the freight when it was such as required it, and put it on the trucks; but when the freight was large, or it became necessary, both classes of men joined together in loading the trucks. There was sometimes one man, and sometimes there were two men to a truck. The boatmen and the railroad men all acted together. The boat had some trucks; and both classes of men went together on board the boat, and took the freight from the point where it was then and had been originally placed; and both ran the trucks or carried the goods by hand off the boat and into the cars of the defendants. Whenever any extra men were required for this service, the arrangement was for the parties to share the expenses equally, so that at all times each party provided and paid an equal number of men for loading and unloading. The clerk with the freight book was not present and had nothing to do with discharging. One of the mates acted in thus delivering or discharging the freight. No account was kept by any one of what was delivered or received, and no goods were checked off on the freight book as they were delivered at any time, and no receipt required or given. This was never done."

Between half past one o'clock and two o'clock on the morning of December 29, while the transfer of freight from the boat to the cars was thus going on, a fire broke out in the bunk-room of the defendants' station; and spread so rapidly as to drive away suddenly all the men engaged in the work; and consumed the steamboat, wharf, station-houses, sheds and cars, and all the freight, including the goods of the plaintiffs. There was no evi-

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dence tending to show that this fire was the result of negligence or design on the part of any one connected either with the steamboat or the railroad.

Charles A. Davis and Henry Davis, two witnesses called by the defendants, testified that they were in the employment of the defendants, and "had charge of receiving the freight as it came from the boat; that they received it on the dock, and had no charge of it until it reached the dock." Charles testified further that he was the defendants' yard master and despatcher of trains, and that it was his duty to see to the proper storage of freight in the cars; that although the railroad men were sent into the boat to get goods, he had no charge of them there, but while in the boat they were under the charge of the mate, although they were all the time in the employment of the defendants and paid by the defendants for all their services rendered on the boat as well as elsewhere; that as to all the men engaged in the work of transferring the freight from the boat to the cars, he had as much oversight of one man as of another; and that he was on the boat a few minutes before the fire. And Henry testified that he was on the boat when fire broke out; and that there were at that time on the boat ten or twelve men of the boat and as many of the railroad.

It was admitted that part of the goods of the plaintiffs were stowed in the cars before the fire broke out; but there was controversy as to whether all of the rest, or, if not all, then what portion of the rest, had been unloaded from the boat; and much evidence was introduced on the subject. The plaintiffs contended that all their goods were in the actual or the constructive possession of the defendants so as to render the defendants liable for their loss; and the foregoing embraces the substance of the evidence which tended to prove that the defendants had received into their possession on board of the steamboat any of the goods of the plaintiffs. In the bill of exceptions on which the argument was had before the full court, such evidence was stated in detail.

The plaintiffs contended, as matter of law, "that under the arrangement and practice shown in evidence between the cor-

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porations forming the said line, the steamboat company were so far the agents of the defendants, or in partnership with them, that the defendants were liable for the goods destroyed on the steamboat, certainly after the arrival of the boat at the wharf and the men had actually begun upon and were engaged in removing the goods, as the evidence tended to show;" but the judge ruled otherwise.

They then submitted certain prayers for instructions, some of which assumed, and others left to the jury to determine, that the defendants were liable for the goods of the plaintiffs, whether burnt upon the boat or on shore. These also the judge refused; and on the question of the delivery of the goods, and their receipt for transportation by the defendants, he instructed the jury as follows:

"The defendants, as common carriers, are liable for all goods destroyed by this accidental fire, which, when destroyed, had been received by them for transportation over their road. This would ordinarily be a question of fact, but on undisputed facts becomes a question of law. Upon the evidence, the defendants concede that in each action they are liable for all the goods belonging to either plaintiff, which at the time of the fire had been removed from the boat, whether at the moment of their destruction they were on the wharf, in the station, or in the cars. As to the goods remaining on the steamboat and there consumed by fire, they are not liable, with the following exception, to which the defendants assent: They are liable also for any goods which are proved to have been actually taken possession of on the steamboat by any of the servants or employees of the railroad company, either by loading them on the trucks, or taking them by hand to carry on shore. For all goods consumed by fire on the boat under such circumstances, after such a delivery to the railroad company, it is liable; but as to all other goods consumed upon the steamboat, the evidence is not sufficient to warrant the jury in finding that the railroad company had any such possession of them as to be liable as common carriers for their loss.

"The judge declined giving any instructions as to any joint

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or mixed possession as between the railroad or boatmen, or as to any constructive possession by the defendants, other than as given above. At the close of the charge, the following additional request was made in writing, which he declined to give, saying that, as the evidence stood, (all of which was recited in the bill of exceptions,) he meant to be understood as ruling against the plaintiffs on that point, namely: That it is not necessary in order to constitute delivery, as in case of a lot of pails, or cans, or tubs of butter, forming one shipment, that the defendants' men should actually get them in hand on the boat; that is, in actual manual possession. It is enough if they had accepted the lot and taken general charge and begun to remove them."

The jury returned a verdict for the plaintiffs for a part only of their claim; and they alleged exceptions.

A. A. Ranney & N. Morse, for the plaintiffs.

J. G. Abbott & W. G. Russell, for the defendants.

Hoar, J. The rules of law which limit and fix the liability of successive carriers of goods over a continuous line of transportation have been recently very fully considered and stated in the case of *Darling* v. *Boston & Worcester Railroad Co.* 11 Allen, 295. The authorities were there reviewed to such an extent that we do not consider it necessary or expedient to examine them again in detail. It will be sufficient to refer to the rules which were adopted, and apply them to the decision of the case before us.

The defendants are proprietors of a railroad, connecting with a steamboat company at one end of their road, and with another railroad at the other end, the three forming a continuous line of transportation for passengers and freight between New York and Boston. A fixed price for freight was charged for the whole transportation between the two cities, each company receiving an agreed proportion for its share of the service. The goods which are the subject of the suits were received in New York by the steamboat company to be carried to Boston, and the whole freight bills were to be collected by the other railroad company on the delivery of the goods in Boston. No agree-

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ment was proved at the trial by which the defendants had entered into any express contract by which they would be responsible for anything beyond the safe carriage of the goods upon their own line. The defendants have not sued upon the contract for the entire transportation, nor claimed an interest in the entire freight; which distinguishes the case from *Fitchburg & Worcester Railroad Co.* v. *Hanna*, 6 Gray, 539. There was no general agreement between the three companies by which they were to share the proceeds of the whole business on all the lines; so that it is not within the principle laid down in *Champion* v. *Bostwick*, 18 Wend. 176. There is therefore nothing in the case, which, under the doctrines stated in *Darling* v. *Boston & Worcester Railroad Co.*, would create a partnership or joint liability between the defendants and the other companies composing the line.

It then only remains to determine to what extent the defendants were liable as common carriers for the goods of the plaintiffs which were destroyed by fire. The general rule is perfectly well settled, that the responsibility of a common carrier for goods commences when goods are delivered to and accepted by him for the purpose of transportation. The defendants were therefore answerable only for such goods as they had actually received for the purpose of conveying in their cars. Story on Bailments, § 453. *Merritt* v. *Old Colony & Newport Railway Co.* 11 Allen, 80. When the facts are all found, the question what constitutes a delivery and acceptance is a question of law. And we think upon the uncontested evidence at the trial, there is no doubt that the instructions given to the jury were at least sufficiently favorable to the plaintiffs, and that they have therefore no ground of exception.

When goods are delivered by one carrier to another, it is evident that the liability of the second commences only when that of the first terminates. If there be no relation of partnership between them, one cannot receive and accept the goods for transportation until the other has completed the delivery of them to him, and discharged himself from the custody or control of them. It was the duty of the steamboat company not only to

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carry the goods safely on their boat, but to deliver them upon the wharf to the defendants. When they were placed upon the defendants' wharf, which was the defendants' place of deposit, the responsibility of the steamboat company ended, and that of the defendants began.

The peculiarity of the case is, that, as the goods were to be immediately loaded into the cars, it was more convenient that they should be transferred at once to the cars from the boat, and not put upon the wharf. Each company being interested in the dispatch of freight as easily and rapidly as possible, and each having men in their employment, the work could be more swiftly and conveniently performed by having the two sets of men act in concert, and each do a part of the work of the other. But we can see no evidence, from this arrangement, of any delivery of the goods from the steamboat until they reached the wharf. On the contrary, the fair and direct inference is, that the defendants' men, while on the boat, were merely assisting the steamboat's men in putting the goods ashore, who in return, when they went upon the wharf, repaid the service by carrying to the cars the goods which they had landed. But though the railroad men took the goods upon the trucks on the boat, they did not bring them into the possession of the railroad company till they reached the wharf. The taking of a part of a lot of goods, and the fact that the rest were pointed out and ready to be taken on the boat, constituted no constructive delivery of the whole. There was no single package which was not taken up, which might not as likely be taken by the men employed by the steamboat company as by those employed by the railroad. More was to be done by the steamboat company's men before the transfer was completed; the goods were still upon the boat; and the possession and consequent responsibility of the steamboat company was therefore not divested.

We are therefore all of opinion that no instructions which were asked, which assumed, or would have left it to the jury to find, that the defendants were liable for any packages which were destroyed upon the boat, were improperly refused; that the instructions given, if in any respect erroneous, were so be-

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cause, being given with the consent of the defendants, they were too favorable to the plaintiffs; and that the

Exceptions must be overruled.

WILLIAM MURRAY *vs.* LEROY J. CHERRINGTON.

A written lease of a house, at a certain rent per annum, payable "in monthly payments, or otherwise *pro rata*," for a term to begin "when said house is suitable to be occupied" by the lessee, and undefined in duration except by a stipulation that if, after two years from the time when the lessee should move into the house, the lessor should wish to live there, he might do so, and the lessee might then retain, if he should desire, certain rooms "for such a term as may be agreeable to us both," creates only a tenancy at will; and parol evidence is inadmissible to give it a different construction.

ACTION on the Gen. Sts. *c.* 137, for possession of a dwelling-house in South Boston. Writ dated April 20, 1867. At the trial in the superior court, before *Wilkinson*, J., without a jury, the defendant contended that he held the premises of right against the plaintiff, by virtue of a letter of the plaintiff, dated September 20, 1866, and stamped with an internal revenue stamp, and of certain subsequent receipts of the plaintiff, all of which were introduced in evidence.

The letter, signed by the plaintiff and addressed to the defendant, ran as follows: "I hereby let you the whole of my house on Mercer Street in South Boston, when said house is suitable to be occupied by you, for a rent of four hundred and eighty dollars per annum, to me paid in monthly payments, or otherwise *pro rata*, and will give you the privilege of reletting to a good party such a portion of it as you may wish to; but it is to be understood that, in case after two years subsequent to your moving into said house I should wish to live in the house myself, I can do so, and that then you may still retain, if you wish so to do, the second floor and front chamber and bed-room adjoining, for such a term as may be agreeable to us both." On the back of it were indorsed, a receipt signed by the plaintiff, under date of September 28, 1866, of one hundred dollars from

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the defendant, "which said sum I hereby agree to pay him in rent of house owned in my name situated on Mercer Street in South Boston, which said house I have let to him in accordance with my letter to him dated September 20, 1866;" and a receipt signed by the defendant "of one hundred dollars on the within, in rent of house owned by William Murray." The others were receipts in ordinary form for monthly payments of rent made by the defendant; and the last, dated April 3, 1867, reserved to the plaintiff all rights to determine the defendant's tenancy "acquired by notice heretofore served on him." It was agreed that the defendant entered into possession of the premises on October 23, 1866, under the letter of September 20, and had continued in possession to the date of the writ.

The judge refused the defendant's prayer for a ruling "that the letter and receipts, together with the actual possession as aforesaid, constituted a valid lease of the premises for the term of two years from October 23, 1866;" and ruled to the contrary; excluded parol testimony offered by the defendant to prove that the letter was executed and delivered by the plaintiff as a lease for years; and found for the plaintiff. The defendant alleged exceptions.

A. Wellington, for the defendant.

W. W. Doherty, for the plaintiff.

Foster, J. 1. Upon very familiar principles, parol evidence was inadmissible to aid the construction of the letter from the plaintiff to the defendant, which was claimed to create a lease for years.

2. We are also of opinion that the ruling of the presiding judge was correct, that the terms of this letter did not create an estate for years, namely, a lease for two years, between the parties. The duration of a lease for years must be certain; this includes both its commencement and termination. It may be conceded that a lease for years may begin "when a house is suitable to be occupied," according to the maxim, *Id certum est quod certum reddi potest.* But the fatal objection remains that no period of termination is fixed by this letter. A leasehold interest for an uncertain and indefinite term is an estate at will

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only. Shaw, C. J., in *Cheever* v. *Pearson*, 16 Pick. 271. *Bishop of Bath's case*, 6 Co. 35. Bac. Ab. Lease, L. 3. It is indisputable that an entry by the lessee under this instrument would not bind him to remain for any definite period. He could terminate his tenancy in the modes provided by statute. As to him, there is no term of certain duration. Consequently there can be none as to the landlord.

The proviso, that after two years from the commencement of the occupancy the landlord may live in the house if he wishes to do so, and that then the tenant may still retain, if he wishes, certain rooms, cannot change the construction. This clause has no tendency to show that the tenant was bound to remain during the two years. *Exceptions overruled.*

ELIZABETH F. NOBLE & others *vs.* MARK GOOGINS.

In a written contract for the purchase of land for a gross sum, a description of the land by its boundaries, or the insertion of the words "more or less," or of equivalent words, will control a statement of the quantity of land, or of the length of one of the boundary lines, so that neither party will be entitled to relief on account of a deficiency or surplus, unless in case of so great a difference as naturally raises the presumption of fraud or gross mistake in the essence of the contract.

A. agreed in writing to pay B. a gross sum for a "wharf lot on C. street" extending from the street to the channel, and described as bounded on one side by D.'s shipyard, and on the other side by the shipyard of E., and as "measuring about two hundred and twenty feet on C. street, more or less." In fact, it measured only one hundred and seventy feet on C. street, and was proportionally less valuable. At and long before the time of signing the agreement, deeds of the lot and of the adjoining shipyards, showing their actual width and boundaries, were duly recorded in the registry of deeds. *Held*, that in the absence of fraud A. was not entitled, in law or equity, to any abatement of the stipulated price.

CONTRACT for a balance of the price due under the defendant's written agreement for the purchase from the plaintiffs of a wharf lot on Border Street in East Boston. The defendant claimed an abatement from the stipulated price, for the reason of a deficiency in the quantity of land.

The case was submitted to the determination of the full court on facts agreed, the material part of which is stated in the opin-

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ion; and with an agreement of the parties that if the court should be of opinion that the plaintiffs were entitled to recover the whole or any part of the purchase money, or that the defendant was entitled to abatement, judgment should be entered accordingly.

F. E. Parker, for the defendant, was first called upon.

H. W. Muzzey, for the plaintiffs.

Gray, J. The defendant, by the writing signed by him, agreed to pay to the plaintiffs "seven thousand dollars for wharf lot on Border Street," and further described the lot as bounded on one side by the shipyard of Paul Curtis and on the other by that of Donald McKay, and as "measuring about two hundred and twenty feet on Border Street, more or less." The land owned by the plaintiffs, and of which they have tendered a deed to the defendant, is a wharf lot lying between and bounded by these two shipyards, and extending from Border Street to the channel, but in fact measuring only one hundred and seventy feet on Border Street. It is agreed that when the writing was signed and delivered, and long before, the title deeds of the three estates were recorded in the registry of deeds, and showed the actual width and boundaries of the lots; but that neither the plaintiffs' agent with whom the contract was made, nor the defendant, had actual knowledge of those deeds or their contents. It is also agreed that the value of land on Border Street is in proportion to the number of feet of land on the line of that street. But the price stipulated in the contract is an entire sum, and there is no evidence that in fixing it the parties had any regard to the length of that line. The question argued is, whether upon these facts the defendant is entitled, in law or equity, to a proportional abatement in the price, or whether the plaintiffs may recover so much of the purchase money as has not been paid.

The agreement not only describes the premises as an entire estate by the words "wharf lot on Border Street," and gives the width on that street as "about two hundred and twenty feet, more or less," but it states that it is bounded on either side by shipyards in the occupation of persons named, the limits of

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which would apparently be manifest upon looking at the premises, and the exact dimensions of which, as well as of the lot agreed to be conveyed, might have been ascertained by examination of the public records of the county. It is quite clear that if a deed had been made in these terms, a difference either way of less than one fourth in the actual width of the lot (like a similar variance in stating the quantity of land granted) would not have defeated the conveyance, or entitled either party to set it aside or to claim an increase or diminution of the stipulated price. *Day* v. *Fynn*, Owen, 133. *Anon.* Freem. Ch. 106. *Twyford* v. *Wareup*, Finch, 310. Lord Cottenham, in *Okill* v. *Whittaker*, 2 Phil. Ch. 340. *Powell* v. *Clark*, 5 Mass. 355. *Stebbins* v. *Eddy*, 4 Mason, 414.

The defendant contends that a different rule is to be applied to an executory contract for the sale of land, even for a gross price; and in support of this position relies on some English chancery cases, from which it is difficult to extract any consistent principle.

In *Hill* v. *Buckley*, 17 Ves. 394, a tract of woods was described, in the agreement of which specific performance with an abatement of price was sought, as "containing two hundred and seventeen acres and ten perches of statute measure." Sir William Grant, after a remark (which would seem to have been sufficient to dispose of the case) that "the particularity of the statement, descending to perches, would naturally convey the notion of actual admeasurement," uttered this *dictum*, which has since been cited as establishing a general rule: "Where a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be to have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation. That is the rule generally; as, though the land is neither bought nor sold professedly by the acre, the presumption is, that in fixing the price regard was had on both sides to the quantity which both suppose the estate to consist of." But in the later case of *Winch* v. *Winchester*, 1 Ves. & B. 375, the same learned judge was of opinion that an agreement to sell an estate described as being

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in the occupation of a certain person, and as "containing by estimation forty-one acres, be the same more or less," did not entitle the purchaser to an abatement of price for a deficiency of five or six acres, if the vendor did not know the true quantity, and made no other statement what it was.

The *dicta* of Lord Eldon afford no clearer guide. In *Townshend* v. *Stangroom*, 6 Ves. 341, his words were: "As to the expression 'more or less,' I do not say those words in a contract will not include a few additional acres; but if parties are contending about three acres, it would be very singular upon these words to add twenty-four map acres, which he knew were already demised, as far as parol could demise them, to" a third person. In *Portman* v. *Mill*, 2 Russ. 570, the contract was for a certain farm, "containing by estimation three hundred and forty-nine acres or thereabouts, be the same more or less," and stipulated that the premises should be taken at the quantity thus stated, whether more or less; and the learned chancellor merely said that he never could agree that such a stipulation as this, "if there were nothing else in the case," would cover a deficiency of more than a hundred acres.

There could be no better evidence of the unsatisfactory state of the English law upon this point than the caution with which it is expressed by so acute, discriminating and profound a commentator and so eminent a judge as Lord St. Leonards. "Where the contract rests *in fieri*, the general opinion has been, that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contain the words 'more or less,' or 'by estimation,' or even stronger words." Sugden on Vendors (14th ed.) 324.

The American courts have shown more unwillingness than the English to encourage litigation about the amount of the price by reason of a variation in the quantity of land agreed to be conveyed, without clear evidence that the quantity was made an essential element of the bargain.

The leading case is *Mann* v. *Pearson*, 2 Johns. 37, in which a bond for the conveyance of "lot No. 78, in the township of Lysander, containing six hundred acres," was held by a majority

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of the supreme court of New York, consisting of Kent, C. J., and Spencer and Tompkins, JJ., to be fully complied with by giving a deed of the same lot, describing it as "containing six hundred acres of land, be the same more or less," although it was found by actual survey to contain less than four hundred and twenty-two acres; and even Livingston and Thompson, JJ., who dissented from the decision, expressed opinions that if the bond had contained either a particular description of the estate by metes and bounds, or the words "more or less," it would have controlled the statement of the quantity. That case was referred to, with respect and apparent approval, by Mr. Justice Parker in *Howe* v. *Bass*, 2 Mass. 382, 383, and by the supreme court of Pennsylvania in *Smith* v. *Evans*, 6 Binn. 107, 109.

It has since been declared by a great weight of authority, in accordance, as we think, with the soundest reason, that in an agreement for the sale and purchase of land for an entire sum either a description of the land by its boundaries, or the insertion of the words "more or less" or equivalent words, will control a statement of the quantity of land or of the length of one of the boundary lines, so that neither party will be entitled to relief on account of a deficiency or surplus, unless in case of so great a difference as will naturally raise the presumption of fraud or gross mistake in the very essence of the contract. *Stebbins* v. *Eddy*, 4 Mason, 414. 1 Story Eq. §§ 144 *a*, 195. 4 Kent Com. (6th ed.) 467 and note. *Marvin* v. *Bennett*, 8 Paige, 312, and 26 Wend. 169. *Morris Canal Co.* v. *Emmett*, 9 Paige, 168. *Faure* v. *Martin*, 3 Selden, 219. *Ketchum* v. *Stout*, 20 Ohio, 453. *Stull* v. *Hurrt*, 9 Gill, 446. *Weart* v. *Rose*, 1 C. E. Green, 290.

The court is therefore unanimously of opinion that the defendant shows no ground in law or equity for abatement of the stipulated price, and is liable to the plaintiffs for the whole amount thereof which has not been paid.

Judgment for the plaintiffs.

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JAMES M. SHUTE & wife *vs.* CITY OF BOSTON.

In that clause of the Gen. Sts. c. 43, § 79, which gives to any person aggrieved by doings of the board of aldermen of the city of Boston in relation to laying out a way the right, if his application is merely for assessment of damages, to apply for a jury within one year after the final determination of any suit wherein the legal effect of their doings is drawn in question, the words "any suit" embrace only suits to which the applicant is a party and so bound by the judgment, or the judgment in which is binding on all persons, like a judgment *in rem*.

PETITION for the assessment by a jury of the damages sustained by the petitioners by the taking of their real estate by the city of Boston under the St. of 1865, c. 159, to lay out a street between Milk Street and Broad Street in that city. In the superior court, *Vose*, J., ordered the petition to be dismissed on the ground that it was not filed seasonably; and the petitioners alleged exceptions. The facts appear in the opinion.

B. F. Brooks & J. D. Ball, for the petitioners.

J. P. Healy, for the respondents.

COLT, J. The mayor and aldermen of the city of Boston, acting under the special act authorizing the laying out of a street between Milk and Broad Streets in that city, St. 1865, c. 159, proceeded in September 1865 to lay out the same, taking as embraced within the location the lands of the petitioners and others, including the land of Edward Dorgan. The damages sustained by the plaintiffs were estimated by the mayor and aldermen in October following, and this petition was entered at the July term of the superior court in 1867, alleging that the plaintiffs are aggrieved by the said estimate and asking that the same may be assessed by a jury.

The act of 1865 gives to any party aggrieved by the doings of the mayor and aldermen under it the like remedy by petition for a jury, and with the same limitations as to the time of bringing such petition as in other cases of widening and altering streets in the city of Boston, and provides that the damages for such taking shall be assessed by a jury in the same manner as damages for the taking of land for highways. By the Gen. Sts. c. 43, § 79, the party aggrieved in such cases may apply for a

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jury to the superior court within one year after the passage of the order upon which the application is founded; or, if the application be for the assessment of damages or indemnity merely, "within one year after the final determination of any suit wherein the legal effect of the proceedings of the board of aldermen is drawn in question."

The respondents object that the petition in this case is not seasonably filed; and the petitioners, relying upon the latter provision of the statute, produce the record of a suit in equity commenced by said Dorgan October 21, 1865, in which he alleges the unconstitutionality of the act and the illegality of the proceedings of the city under it, which was brought to a hearing in this court and ended September 1, 1866, by a decree dismissing the bill. *Dorgan* v. *Boston*, 12 Allen, 223. The question therefore is, whether the suit of Dorgan is such a suit as is intended to be and is described in the statute by the words "any suit." Taking all the provisions of the statute into consideration, and giving reasonable effect to its words, we are of opinion that it is not, and that the plaintiffs cannot avail themselves of the proceedings in Dorgan's suit to extend the first limitation of one year.

The construction for which the plaintiffs contend would make the statute mean that any action, whenever and by whomsoever brought, or however incidentally the legal effect of the proceedings of the city might be drawn in question therein, should be effectual to extend and even renew the right of the plaintiffs to demand an assessment of damages by the jury. Thus, an action of trespass to person or property, brought by any landowner disturbed by the location, or a suit in favor of a traveller against the city for an injury sustained in passing upon the new street, or even a suit in which neither the plaintiffs nor the city were parties, in all of which the legality of the location of the street might be drawn in question, could, if such legality of location was passed upon, be set up in all cases to justify delay beyond the stipulated one year in petitioning for a jury.

The words "any suit" are not to have such a broad meaning. On the contrary, they must be held to embrace only suits

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wherein the party making application for a jury is a party and bound by the judgment, or proceedings like the writ of *certiorari*, where a judgment establishing or avoiding the act of the city in taking the land for the way is, like a judgment *in rem*, binding upon all persons. The suit of Dorgan, it is true, was a suit in equity in which, if the decision of the court had been in his favor, declaring the act unconstitutional, the result would have operated to render the plaintiffs' application unnecessary; but the plaintiffs were not parties to that suit, and the judgment is not, strictly speaking, binding on them. The prayer of the bill in that case was, that the city should be restrained from appropriating Dorgan's lands, not the lands of others. He was acting solely for the protection of his own property, and there was no privity between him and the plaintiffs here. If the judgment establishing the constitutionality of the act is in one sense binding on all parties afterwards calling it in question in our courts, it is not so binding in the sense in which a judgment is conclusive upon the parties to it, or, if a judgment *in rem*, upon all persons. It was equally open to all parties interested to commence the same suit brought by Dorgan, or to join him in it. The plaintiffs, by awaiting the decision in that case and taking the risk, have now lost the right to appeal to a jury from the estimate of damages made by the board of aldermen.

Exceptions overruled.

METROPOLITAN RAILROAD COMPANY *vs.* BROADWAY RAILROAD COMPANY.

An award of commissioners appointed on petition under the St. of 1864, c. 229, § 29, to revise a previous award of commissioners determining the compensation to be paid by one street railway corporation for entering and using the tracks of another, takes effect only when returned to and approved by the court, until which time the former award remains in force.

PETITION, filed December 9, 1864, on the St. of 1864, c. 229, § 29, for the appointment of commissioners to determine the rate

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of compensation to be paid by the respondents for entering and using a portion of the tracks of the petitioners, (both parties being street railway corporations,) and to revise and alter a former award of commissioners returned into court in November 1862. On this petition commissioners were appointed, and a warrant was issued to them under date of January 10, 1865. They returned an award February 15, 1868, on the issue of the approval of which a hearing was had before *Foster*, J., who reserved for the determination of the full court the question from what time it should take effect, and reported the material facts in substance as follows:

The first board of commissioners found, by their award, that the cost of the section of the petitioner's railroad used by the respondents was $46,197.96, and the annual cost of maintenance thereof was $11,970.97; and awarded that the respondents should pay annually to the petitioners one fifth of the latter sum, or $2,394.19. The second board of commissioners found the annual cost of its maintenance to be $14,500; and awarded that the respondents should pay, in semi-annual payments, to the petitioners, such a proportion of $14,500 annually "as the use of it by the cars of the respondents bears to the whole use of it by all the cars running upon it or any portion of it."

The award of the second board of commissioners contained this further provision: "It was claimed by the petitioners that any revision of the compensation established by the former award should take effect from the time of filing the petition in this case. The respondents denied the power of the commissioners to make any award which should affect the rule of compensation anterior to the making of this award. If the court should be of opinion that, under a true construction of the statute, the commissioners have power to revise the former award from the time of filing the petition in this case, then we award further that the respondents shall pay to the petitioners such sum as, with the amount paid since the filing of the petition, will make the compensation for the use of said circuit by the respondents equal to that which would have been paid if the respondents had made compensation according to the rule above

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given for its future use." And the parties agreed that since the date of the filing of this petition the cars of the respondents had run more than one fifth of all the miles run over the section of the petitioners' road, which was the subject of the controversy, and more miles than they ran previously to that date.

E. H. Derby, for the petitioners.

P. W. Chandler & G. O. Shattuck, for the respondents.

CHAPMAN, C. J.* A former award has been made between these parties, which was returned to this court at November term 1862; and the award now presented is a revision of the former one. The question presented is, whether the operation of the former award ceased at the time of presenting the petition for the revision, or remains in force till the award made under the petition for revision shall be accepted by the court. This depends upon the language of the St. of 1864, *c.* 229, § 29. This section provides that the award of the commissioners, or a major part of them, being returned to and approved by the court, "shall be binding upon the respective corporations interested therein, for one year, and until the same is revised or altered by commissioners in like manner appointed; provided, however, that no such award shall apply to any period of time covered by any previous award of commissioners or by agreement of parties."

The provision that the first award shall remain in force for one year, without regard to any changes that may take place in the relative use of the road by the parties, is positive. The provision that it shall also remain in force until it is revised or altered by commissioners in like manner appointed is equally positive. But an alteration or revision does not take effect until it is accepted and approved by the court; and therefore the first award must remain in force until such acceptance and approval.

But it is objected that this construction of the statute creates an arbitrary rule which does not accord with the equity of the present case. The objection has some force. But it is to be

* COLT, J., did not sit in this case.

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considered that the legislature had two objects to accomplish. They intended to give the parties an opportunity for frequent revision and alteration of the rate of compensation; and at the same time to guard against too frequent litigation on the subject. An arbitrary rule was necessary in order to accomplish the latter object; as it is in statutes of limitations, and in many other cases. Substantial justice is proximately secured by provisions of this character.

The language of the statute was undoubtedly framed with care; for the statute is a revision of former legislation that had existed on the subject, and under which there had been some litigation. The conflicting interests of parties in such matters must have been understood, and there does not appear to be any good reason for construing the statute otherwise than according to the obvious import of its language.

Award to take effect from the time of its acceptance.

PATRICK MELLEY *vs.* JOHN CASEY.

A lease of real estate by a married woman for a term exceeding one year, without the assent of her husband in writing, or his joining in the conveyance, or the consent of a judge, as provided in the Gen. Sts. *c.* 108, § 3, is not void merely for the excess above one year, but is void altogether; nor does it become valid by the express exception of it from the covenant against incumbrances in a subsequent warranty deed of the premises by her and her husband to a third person; nor by her assignment of it afterwards to such third person with the written assent of her husband.

The assent of the husband required by the Gen. Sts. *c.* 108, § 3, to render valid a lease by his wife of real estate for a term exceeding one year, is an assent contemporaneous with the execution of the lease, and delivered or communicated as an operative part of it.

A grantee of real estate is not estopped from maintaining an action on the Gen. Sts. *c.* 137, for possession, against one who was in occupation of the premises as tenant at will at the time of the conveyance and neglects to deliver them up notwithstanding notice thereof, by his serving two notices upon the tenant before bringing the action, the first purporting to determine an invalid lease of the premises for a term of years by the previous owner to the tenant, and the second to quit for nonpayment of rent.

ACTION on the Gen. Sts. *c.* 137, for possession of a house on Federal Street in Boston. Writ dated February 2, 1867. At

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the trial in the superior court, before *Putnam*, J., without a jury, these facts were agreed:

On August 1, 1866, the defendant was occupying the house as tenant at will of Mary W. Stevens, its owner, when she alone, without the written assent of her husband, George A. Stevens, executed a lease of the premises to the defendant for three years from that date, for a rent payable monthly. The defendant continued to occupy the premises, and paid to Mrs. Stevens regularly the stipulated rent, until on December 1, 1866, she and her husband conveyed them to the plaintiff, by a warranty deed excepting from the covenant against incumbrances the lease to the defendant, and stipulating that it should be assigned to the plaintiff; and on the same day, Mrs. Stevens executed to the plaintiff an assignment of the lease, and her husband indorsed thereon his assent to such assignment. On December 31, 1866, the plaintiff entered the premises, and served a notice upon the defendant that he made the entry in order to determine the lease for breach of the defendant's covenant therein against underletting, and demanded a surrender of the premises "for the reason aforesaid;" and on January 16, 1867, he served on the defendant another notice to quit in fourteen days for non-payment of rent, describing the defendant as in possession of the premises under a claim of being lessee thereof, and setting forth that the plaintiff waived by the notice none of his existing rights to possession of the premises, nor any remedies therefor to which he was then entitled.

On these facts, the defendant contended that the lease, if invalid originally, became valid by the exception of it from the covenant against incumbrances in the deed to the plaintiff, and by the assent of the husband to the assignment; but the judge ruled otherwise, and further ruled that the defendant's right of occupation was determined by the conveyance of the premises to the plaintiff, and that the defendant was liable to this action "after reasonable notice" of such conveyance. On the question of notice, upon testimony introduced by both parties, he found as fact that on or about December 24, 1866, the defendant had notice of the conveyance, and was told that he would be re-

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quired to quit unless he should agree to pay more rent; but there was no evidence of any underletting or nonpayment of rent. He thereupon ordered judgment for the plaintiff; and the defendant alleged exceptions.

B. Dean, for the defendant.

G. W. Park, for the plaintiff.

Hoar, J. The lease executed by the wife, being a lease for more than a year, and without the assent in writing of her husband, was wholly void. Gen. Sts. *c.* 108, § 3. Not being within the authority conferred on her by statute, the common law disability of her coverture made her deed inoperative to convey any estate whatever. We find no authority for the doctrine for which the defendant contends, that it might take effect as a lease for a year, and be void only for the excess. It was a single and entire contract; and there was no agreement of the parties for any separate part. The defendant therefore became merely a tenant at will of the leased premises by reason of his entry, occupation and payment of rent.

The deed to the plaintiff, executed by the husband and wife, excepts from the covenants against incumbrances the lease which the wife had undertaken to make, but, as the deed grants the whole estate, the exception gives no affirmative validity to the void lease. The assignment of the lease to the plaintiff, to which the husband assents in writing, was the assignment of an instrument wholly invalid; and gave the plaintiff no other or greater right or estate than he took under the deed which had been executed on the same day. It did not purport to confirm or add to the defendant's title, but merely to transfer to the plaintiff whatever rights the wife had. It is very clear that it could not inure to the benefit of the defendant, because it was wholly *res inter alios acta*, never communicated to him, or delivered to him. The lease made by the wife without the assent of the husband, being void on her part, was also void as to the defendant. To make the instrument binding upon him, we think the assent in writing of the husband which the statute requires must be an assent contemporaneous with the execution of the instrument, and delivered or communicated as an opera-

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tive part of it. The defendant must have accepted a lease to which the husband assented at the time of the acceptance, to give the lease effect as the wife's deed.

The title of the plaintiff being therefore perfect, and his right to the possession of the premises complete against the defendant, he is not estopped from asserting that right in this process on account of giving the notices of December 31 and January 16. Those notices granted no estate to the defendant; they did not mislead him or induce him in any way to alter his condition. The defendant did nothing under or by reason of them. They only tend to show that the plaintiff for a time mistook his rights, but do not prevent his asserting them afterward when discovered. *Exceptions overruled.*

CAROLINE A. G. STOCKBRIDGE *vs.* WALES R. STOCKBRIDGE & others.

T. conveyed land to C., wife of W., "for and during her natural life, and from and after her decease to the persons who would then be the heirs at law of W. if he had then died intestate;" but "upon the trusts and with the powers following:" that C., at any time during the life of W., might, with his consent in writing and under seal, "sell and convey the granted premises, or any part or parts thereof, in fee simple or for any less estate," "the net proceeds of all such sales to be reinvested and held on the same trusts and way as the property so sold," and her deed, with the consent of W., should "cut off the rights of said remaindermen in the granted premises as fully and effectually as if such remainder had not been hereby created and the absolute estate in fee simple had been hereby granted to said C." *Held*, that C. took the fee of the land, in trust; that her own deed, with the concurrence of her husband in the manner provided, would be sufficient to convey the whole title; that no title remained in T.; that the beneficial interest of C. was the use during her life; that, in event of a sale by her, if the reinvestment should be made in real estate, the trust should be fully declared; and that the trust applied to the whole estate conveyed by T., and did not authorize the sale of the interest in remainder and reinvestment of the proceeds thereof separately from the estate in possession.

BILL IN EQUITY by Caroline A. G., wife of Wales R. Stockbridge, to obtain the direction of the court as to the execution of trusts raised by the deed of Charlotte L. Tuttle in her own right, and Gilman Tuttle, her husband, who joined in token

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of his assent, conveying to said Caroline land in Boston on January 1, 1866. A copy of the deed was annexed to the bill, and recited that the grantors, in consideration of $11,700 paid by said Caroline "out of moneys held by her to her sole and separate use free from the interference and control of her husband," sold and conveyed to her "for and during the term of her natural life, and from and after her decease to the persons who would then be the heirs at law of said Wales R. Stockbridge, if he had then died intestate," the granted premises, "to have and to hold the above granted premises, with all the privileges and appurtenances thereto belonging, to the said Caroline for and during the term of her natural life, and from and after her decease to the persons who would then be the heirs at law of said Wales R., if he had then died intestate, and their heirs and assigns forever. But this conveyance is, however, made upon the trusts and with the powers following, namely: The said Caroline, at any time during the life of said Wales R., and with his concurrence testified in writing under his hand and seal, may sell and convey the granted premises, or any part or parts thereof, in fee simple or for any less estate, at public or private sale, at such time or times, to such person or persons, and for such consideration, as may seem to her judicious, without the necessity of applying to any court for leave so to do: the net proceeds of all such sales to be reinvested and held on the same trusts and way as the property so sold; and no purchaser from said Caroline shall in any possible event be bound to see to the application of the purchase money; but the deed of said Caroline, with the consent in writing of said Wales R., shall effectually, to all intents and purposes, and entirely, cut off the rights of said remaindermen in the granted premises as fully and effectually as if such remainder had not been hereby created, and the absolute estate in fee simple had been hereby granted to said Caroline."

The bill set forth that, at the date of the filing of the same, said Wales R. was still living, and his heirs at law were his children Arthur, Margaret and Wales J.; that an offer had been made for the purchase of the real estate, which in the opinion

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of the plaintiff it would be expedient to accept; and prayed for instructions on the following points:

"1. Whether the said deed conveyed to the plaintiff the fee in the premises aforesaid, or only a technical life estate, or what estate was granted to her. 2. Whether her deed in her own name, with the concurrence of her said husband, testified in writing under his hand and seal, would be effectual to pass the entire fee in said premises. 3. Whether a deed in the name of said Charlotte L. Tuttle and Gilman Tuttle, or either of them, executed by the plaintiff with or without the concurrence of the said Wales R. Stockbridge, would be sufficient or requisite to a legal conveyance of said premises. 4. Whether the said deed to the plaintiff conveys to her any, and, if any, what, beneficial interest, or whether the whole estate granted by said deed is an estate in trust. 5. Whether the reinvestment of the purchase money, in case said premises shall be sold, shall be in real estate upon a declared trust; or, 6. Whether the plaintiff may invest the same or any part thereof in her own name."

Wales R. Stockbridge and his children, and Mr. and Mrs. Tuttle were made parties to the bill, and filed answers admitting the allegations of the plaintiff; and the case was reserved by *Gray*, J., on the bill and answers, for the determination of the full court.

J. P. Converse, for the plaintiff, was alone called upon.

D. P. Kimball, for the children of Wales R.

A. R. Brown, for Mr. and Mrs. Tuttle.

WELLS, J. The deed from Tuttle and wife to the plaintiff, by its words of grant and the *habendum*, purports to convey a life estate to Mrs. Stockbridge, with remainder over in fee. But the grantees of the remainder are not so designated as to be at present ascertainable. There is no person, and no class of persons, to whom the description will apply. There can be no such person or class until the termination of the life interest of Mrs. Stockbridge. The deed therefore, by its direct terms, cannot operate as a present conveyance of the fee; not even a contingent interest in the remainder will pass by such uncertain designation of the intended grantees.

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A subsequent clause contains a power to "sell and convey the granted premises or any part or parts thereof, in fee simple or for any less estate," with a declaration of trusts, for the execution of which the power seems to be given. Mrs. Stockbridge has unlimited discretion as to the time and mode of exercising the power, during the lifetime of her husband, subject only to his approval and consent; and her deed, with such consent in writing, is to be effectual "to cut off the rights of said remaindermen" as fully as if "the absolute estate in fee simple had been hereby granted to said Caroline." The proceeds of all such sales are "to be reinvested and held on the same trusts and way as the property so sold." This trust seems to require and to imply a fee in Mrs. Stockbridge.

Construing the whole instrument together, the court are of opinion that its effect is to give to Mrs. Stockbridge the whole title in the lands, to hold in trust, first, for her own use during life; second, for the use of such persons as, at her decease, shall stand in the relation which would make them heirs of Wales R. Stockbridge if he should decease at the same time. When that time arrives, the persons embraced in that designation can be ascertained, and the remainder in fee absolute will then vest in them. Upon this interpretation of the deed, the instructions to be given, in answer to the several questions raised by the plaintiff, are: 1. The deed to Mrs. Stockbridge conveyed to her the fee of the land, in trust. 2. Her own deed, with the concurrence of her husband, as directed, will be effectual to pass the entire title. 3. Mrs. Tuttle has no remaining title to convey. 4. The beneficial interest of Mrs. Stockbridge is the use during her life. 5. The reinvestment should be made with the usual precautions and in the usual manner of investing trust funds. If made in real estate, the trust should be fully declared. 6. The trust applies to the entire estate, and does not authorize the sale of the interest in remainder and reinvestment of the proceeds separately from the estate in possession.

Decree accordingly.

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Catharine Cunningham *vs.* George D. Pattee & others.

D. & P., copartners, were lessees of a parcel of real estate. P. with D.'s assent gave C. an underlease of part of it, (described as a store of a certain number on a certain street,) drawn in the names of both D. and P., but signed by P. only, for the balance of their term, and containing the following covenant: "The lessors promise to renew said indenture for such further term as their leasehold estate in the premises may be renewed or extended." C. entered into possession, and paid rent to D. & P. till the dissolution of the copartnership, when D. assigned to P. all his interest in the original lease; and thereafter C. paid rent to P. alone. At the end of the term, the owner of the whole estate agreed to give a new lease thereof for a shorter term at an increased rent to P. with a surety; and P., in consideration of the agreement of S. to become his surety, gave S. an underlease of the store for the new term. S. took it knowing that C. was in possession as a tenant, but without actual knowledge of the covenant of renewal above quoted, formal notice of which was, however, served on him by C. before the owner executed the new lease to P. After receiving the new lease, P. refused the demand of C. for a renewal; and reëxecuted his underlease to S. *Held*, that the effect of the assignment by D. to P. of all his interest in the original lease was to confirm the underlease to C. and render it as perfect as if it had been signed originally by D. with P. *Held, also*, that the covenant of renewal therein was not void for indefiniteness; and that, notwithstanding the transactions between P. and S., C. was entitled to a renewal at the same rent and with the same covenants, except the covenant of renewal, for the whole of P.'s new term.

Bill in equity, filed May 15, 1867, against George D. Pattee, Charles H. Pattee and Charles T. Stevens, to compel specific performance of George D. Pattee's covenant of renewal, contained in an underlease, dated November 1, 1864, and signed by him alone, but purporting in the body thereof to be the lease of him and John C. Dalton, of "the store on Hanover Street in Boston numbered 262 in the numbering of said street," to the plaintiff, for "the remainder of the lessors' leasehold estate in the premises," at an annual rent of $300; said covenant being as follows: "The said lessors do promise to renew said indenture for such further term as their leasehold estate in the premises may be renewed or extended." The case was submitted for the determination of the full court on agreed facts, the material parts of which were as follows:

Amasa D. Gamage, the owner of a parcel of real estate on Hanover Street, of which the premises in question were a part, leased the whole to the copartnership of Holmes & Smith for

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six years from May 1, 1861, for an annual rent of $1000; and they on December 1, 1863, assigned the lease, for the unexpired balance of the term, to the copartnership of Dalton & Pattee, which consisted of John C. Dalton and George D. Pattee. On November 1, 1864, Pattee gave to the plaintiff the underlease described in the bill, with the understanding that she should procure thereto the signature of Dalton also, who had agreed with him to sign it, and who fully intended to fulfil his agreement but through oversight or inadvertence failed to do so. In pursuance of this underlease, the plaintiff entered into possession, and paid rent to Dalton & Pattee until July 1865, (when that copartnership was dissolved,) and afterwards to Pattee alone. On July 15, 1865, in settlement of the affairs of their late firm, Dalton assigned to Pattee all his title and interest in and under the assignment of the original lease by Holmes & Smith to Dalton & Pattee.

In April 1867, the month before the end of the term of the original lease, Gamage orally agreed to give George D. Pattee a new lease of the whole estate at an increased rent, if Pattee would procure a surety for the performance of his covenants; and Pattee thereupon orally agreed with Charles T. Stevens to underlet to him, under the new lease, the premises then occupied by the plaintiff, if he would become surety. The plaintiff had no knowledge of this agreement between Pattee and Stevens until after the filing of her bill. On May 1, 1867, (Gamage not having at the time executed the new lease,) Pattee gave to Stevens a lease of the premises occupied by the plaintiff, for three years from that date, at the annual rent of $500. On May 13, 1867, Gamage executed the new lease to Pattee of the whole estate, for three years from April 30, 1867, at the annual rent of $1100 and taxes; and Stevens became Pattee's surety thereon. The plaintiff, upon the delivery of this lease to Pattee, demanded of him a renewal of her underlease in pursuance of the covenant therein; but Pattee refused her demand. On the next day, (Stevens and Pattee deeming Pattee's lease of May 1 to Stevens insufficient,) Pattee underlet the whole estate to Charles H. Pattee, and Charles H. Pattee gave to Stevens an

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underlease of the premises occupied by the plaintiff, for the same term and at the same rent stipulated in the lease of May 1. It was agreed that these two leases of May 14 might "be regarded in intent and effect as a lease directly from George D. Pattee to Stevens."

Stevens, at the time of his oral agreement with George D. Pattee in April 1867, knew that the plaintiff was in occupation as a tenant, but had no actual knowledge of the covenant for renewal in her lease; and on May 11, 1867, the plaintiff served on Stevens notice of that covenant, and "that no new lease to George D. Pattee of said premises has yet been executed or delivered," and "that any lease which you may have or take is subject to my equitable rights."

F. W. Hurd, for the plaintiff.

S. E. D. Currier, for the defendants.

Foster, J. This is a bill in equity to enforce specific performance of a renewal covenant in a lease, the terms of which are the following: "And the said lessors do promise to renew said indenture for such further term as their leasehold estate in the premises may be renewed or extended."

1. The first objection to the plaintiff's bill arises from the fact that the sublease to her was signed by only one member of the firm who were the assignees of the original lease from the owner of the estate. In the body of the instrument John C. Dalton and George D. Pattee are named as lessors; but it was executed by Pattee alone. Dalton & Pattee held jointly a lease of a larger parcel than that demised to the plaintiff; and shortly after the execution of the lease to her, Dalton assigned to Pattee all his interest in the original lease. The plaintiff entered upon the demised premises, under the lease executed by Pattee, and has ever since continued in occupation, paying the rent reserved, and performing the covenants of said lease. It did not purport to be a demise of the several interest of Pattee as one of two joint tenants or tenants in common, but was a lease of certain premises described as definitely as if they had been set out by metes and bounds, namely, store No. 262 Hanover Street.

A lease or deed, by one tenant in common to a stranger, of a

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portion of the joint estate, although voidable by the cotenants who do not join therein, is valid between the parties and against all persons unless so avoided. If the title of the cotenant entitled to disaffirm the conveyance becomes vested in the one by whom it was executed, the newly acquired title of the lessor or grantor will inure by estoppel to the benefit of the lessee or grantee. *Keay* v. *Goodwin*, 16 Mass. 1. *Rising* v. *Stannard*, 17 Mass. 282. *Johnson* v. *Stevens*, 7 Cush. 431. *De Witt* v. *Harvey*, 4 Gray, 491. The words "lease, demise and let" amount to an implied covenant for quiet enjoyment at least against the lessor himself. *Dexter* v. *Manley*, 4 Cush. 14. And under the description of the premises in the lease, this covenant plainly applies to the whole store let, and is not limited to the undivided interest of Pattee therein. From these familiar principles it follows that, as soon as the title of Dalton was assigned to Pattee, it operated as a confirmation of the previous lease by Pattee to the plaintiff, whose rights as tenant were thenceforth as perfect as if her lease had been originally executed by both Dalton and Pattee.

2. It is unimportant to consider whether there is anything in the present case to vary the ordinary rule that a covenant to renew a lease is a covenant running with the land; because relief is sought by this bill against the very party who executed the covenant. It is the defendant George D. Pattee's own contract, of which specific performance is demanded.

3. The next topic of inquiry relates to the connection of the defendant Charles T. Stevens with the premises and with the present suit. The new lease to Pattee from the landlord who owned the estate was executed May 13, 1867, and was guaranteed by Stevens. Previously, on May 1, 1867, and pursuant to a verbal agreement in consideration of the proposed guaranty, Pattee leased to Stevens the part of the estate embraced in the lease to the plaintiff. On May 14, George D. Pattee leased all the premises demised by Gamage to him to Charles H. Pattee, and on the same date Charles H. gave Stevens a lease of the plaintiff's portion. The fact is agreed that this must be treated as if made directly from the defendant George D. Pattee to the

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defendant Stevens. When Stevens took his first lease, his lessor had no estate which he could demise; and he had received full and formal notice of the rights of the plaintiff in equity, before the renewal lease was executed by the upper landlord, and therefore before George D. Pattee acquired any title which could inure to the benefit of Stevens by way of estoppel.

The authorities fully support the doctrine in equity that one who purchases an estate, knowing it to be in the possession of a tenant, is bound to inquire into the nature of the tenant's interest, and will be affected with notice of the extent thereof. According to this principle, the known possession of the plaintiff as tenant was sufficient notice to Stevens of the fact that she had a written lease, and of its contents, including the covenant to renew. The general rule is, that notice sufficient to make inquiry a duty is notice of all that by reasonable inquiry would have been ascertained. Adams Eq. 151. 1 Story Eq. § 400. *Taylor* v. *Stibbert*, 2 Ves. Jr. 440. *Daniels* v. *Davison*, 16 Ves. 249.

These considerations require us to regard the defendant Stevens as standing on no better footing than the other defendant, George D. Pattee, by whom the renewal covenant was made. We find nothing to distinguish the present case from the ordinary one of a covenant to renew a lease sought to be enforced between the original parties thereto. The principles by which such a case is governed are established by numerous authorities.

4. The covenant to renew is not void for indefiniteness. The word, *ex vi termini*, imports the giving a new lease like the old one, with the same terms and stipulations; at the same rent and with all the essential covenants. *Rutgers* v. *Hunter*, 6 Johns. Ch. 215. *Willis* v. *Astor*, 4 Edw. Ch. 594. *Carr* v. *Ellison*, 20 Wend. 178. *Piggot* v. *Mason*, 1 Paige, 412. *Tracy* v. *Albany Exchange Co.* 3 Selden, 472. *Whitlock* v. *Duffield*, Hoffm. Ch. 110. *Kelso* v. *Kelly*, 1 Daly, 423. *Price* v. *Assheton*, 1 Y. & Col. Exch. 82. *Rickards* v. *Rickards*, 2 Y. & Col. Ch. 427, 428. To this rule there is one exception, equally well established with the rule itself. The renewal covenant is not to be inserted in the new lease; that agreement is satisfied and exhausted by a sin-

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gle renewal. An agreement to renew *toties quoties* will not be inferred, in the absence of words clearly pointing to that intention. *Hyde* v. *Skinner*, 2 P. W. 196. *Davis* v. *Taylors' Co.* 3 Ridgew. P. C. 395. *Tritton* v. *Foote*, 2 Bro. Ch. 636; *S. C.* 2 Cox Ch. 174. *Russell* v. *Darwin*, 2 Bro. Ch. 638, note. *Reece* v. *Dacre*, 1 Hargr. Jurid. Arg. 438. *Brown* v. *Tighe*, 8 Bligh, (N. S.) 272, 290. *Moore* v. *Foley*, 6 Ves. 232. *Iggulden* v. *May*, 9 Ves. 325; *S. C.* 7 East, 237.

5. But the fact that the covenantor has himself taken a new lease at an increased rent, or upon more onerous conditions than the first, will not relieve him from obligation to fulfil his own contract; nor will it justify charging an increased rent, or imposing greater burdens on the sublessee than those contained in the first lease to him. *Evans* v. *Walshe*, 2 Sch. & Lef. 519. *Thomas* v. *Burne*, 1 Drury & Walsh, 657. *Hackett* v. *McNamara*, Lloyd & Goold, temp. Plunk. 288. *Revell* v. *Hussey*, 2 Ball & Beat. 280. The only way by which the obligation of such a covenant can be escaped is by the covenantor's abandonment of the estate, without a direct or indirect renewal of his own tenancy.

Decree for the plaintiff for a renewal of her lease to expire with the present lease from Gamage, and upon the same terms and with the same covenants as the plaintiff's first lease, omitting the covenant to renew.

NEWTON KLINE *vs.* WILLIAM P. BAKER.

A buyer sent an order for goods to the seller in another state who there delivered them to a carrier for transportation to the buyer. *Held*, that the sale was completed in the state where the seller resided, although the terms thereof were originally agreed on by agents of the parties at the residence of the buyer.

When the evidence of a foreign law consists entirely of a judicial opinion, the question of its construction and effect is for the court; and if it is uncontradicted, and will not support the action, the jury should be so instructed.

In the sense of the rule in *Smith* v. *Smith*, 21 Penn. State, 367, and *Backentoss* v. *Speicher*, 31 Penn. State, 324, that, by the law of Pennsylvania, in order to constitute such fraud as will render a sale void, the buyer's intention not to pay the price and concealment

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of his own insolvency is not sufficient, but there must be "artifice, intended and fitted to deceive, practised by the buyer upon the seller," evidence that the manager of the buyer's business, in negotiating at the buyer's residence in Illinois with the seller's agent for the goods within ten days before the buyer sent his order for them to the seller in Pennsylvania, falsely represented that the buyer owned a farm of considerable value and had other means amply sufficient for carrying on his business, and always bought for cash, and did not owe any man, is sufficient to warrant a finding that the buyer's purchase of the goods, made immediately afterwards on a credit of sixty days, and his subsequent similar purchase from the same seller, made before that credit had expired, were fraudulent and passed no title to goods the sale of which was so induced.

GRAY, J. This action of replevin is brought by the seller of intoxicating liquors against a deputy sheriff attaching the same as the property of the purchaser. The plaintiff contends that the sales were induced by fraud of the purchaser and therefore passed no title to him; and the burden of proving this proposition is upon the plaintiff.

The seller resided in Pennsylvania, and the purchaser in Illinois. The goods were sold in two lots, one in June and the other in August 1865, upon distinct orders sent by the purchaser to the seller. Although the first order was in accordance with terms of sale agreed on between the agents of the parties in Illinois, neither sale was complete until delivery of the goods. That delivery in each case was made to a railroad corporation in Philadelphia, which, in the absence of any agreement between the parties to the contrary, was in law a delivery to the purchaser. Each contract of sale therefore was completed in Pennsylvania, and its validity must be governed by the laws of that state. *Orcutt* v. *Nelson*, 1 Gray, 536. *Finch* v. *Mansfield*, 97 Mass. 89. 2 Kent Com. (6th ed.) 458.

The laws of another state are not laws of this Commonwealth, which our citizens are bound to know, or of which our courts have judicial knowledge; but they are facts, of which both citizens and courts must be informed as of other facts. As foreign laws can only be known so far as they are proved, no evidence of them can be admitted at the argument before this court, which was not offered at the trial or otherwise made part of the case reserved. *Knapp* v. *Abell*, 10 Allen, 485. *Bowditch* v. *Soltyk*, *ante*, 138. When the evidence consists of the parol testimony of experts as to the existence or prevailing construc-

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tion of a statute, or as to any point of unwritten law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony. *Holman* v. *King*, 7 Met. 384. *Dyer* v. *Smith*, 12 Conn. 384. *Moore* v. *Gwynn*, 5 Ired. 187. *Ingraham* v. *Hart*, 11 Ohio, 255. But the qualifications of the experts, or other questions of competency of witnesses or evidence, must be passed upon by the court; and when the evidence admitted consists entirely of a written document, statute or judicial opinion, the question of its construction and effect is for the court alone. *Church* v. *Hubbart*, 2 Cranch, 187. *Ennis* v. *Smith*, 14 How. 400. *Owen* v. *Boyle*, 15 Maine, 147. *State* v. *Jackson*, 2 Dev. 563. *People* v. *Lambert*, 5 Mich. 349. *Bremer* v. *Freeman*, 10 Moore P. C. 306. *Di Sora* v. *Phillipps*, 10 H. L. Cas. 624. And if the evidence is uncontradicted, and will not support the action, it is the duty of the court so to instruct the jury.

By the law of Massachusetts, purchasing goods with an intention not to pay for them is of itself a fraud which will render the sale void and entitle the seller to reclaim the goods. *Dow* v. *Sanborn*, 3 Allen, 181. The only evidence, introduced at the trial, of the law of Pennsylvania upon this subject was the cases of *Smith* v. *Smith*, 21 Penn. State, 317, and *Backentoss* v. *Speicher*, 31 Penn. State, 324, as published in the official reports, by which it appears that, in the opinion of the supreme court of that state, there must be "artifice, intended and fitted to deceive, practised by the buyer upon the seller," in order to constitute such a fraud as will make the sale void; and that the buyer's intention not to pay for the goods and concealment of his own insolvency is not such a fraud. These reports were competent, and, in the absence of all other evidence, conclusive proof, of the law of Pennsylvania. Gen. Sts. *c.* 131, § 64. *Penobscot & Kenebec Railroad Co.* v. *Bartlett*, 12 Gray, 244.

But the plaintiff introduced evidence that Burleigh, who was either a partner or the manager of the business of Dore, the purchaser, represented to Sheble, the agent of the plaintiff, at the time of negotiating with him for the purchase of the first lot of liquors, and within ten days before sending the order for them

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to Philadelphia, that Dore had a farm worth ten thousand dollars, and other means amply sufficient to carry on his business, and that he always purchased for cash and did not owe any man; and that these representations were false. This was clearly sufficient evidence of fraudulent representations intended to induce and in fact inducing the plaintiff to sell to Dore, or, in the language of the supreme court of Pennsylvania, "artifice, intended and fitted to deceive, practised by the buyer upon the seller," to warrant a jury in finding that the purchase made immediately afterwards on a credit of sixty days, as well as the subsequent purchase made before that credit had expired, was fraudulent and passed no title. The learned judge therefore erred in ruling that upon the evidence the plaintiff could not recover, and in directing a verdict for the defendant. *Nichols* v. *Pinner*, 18 N. Y. 295, and 23 N. Y. 264. *Hall* v. *Naylor* 18 N. Y. 588. *Reenie* v. *Parthemere*, 8 Penn. State, 460. *Seaver* v. *Dingley*, 4 Greenl. 306. *Wiggin* v. *Day*, 9 Gray, 97.

Exceptions sustained.

J. Lathrop, for the plaintiff.

J. D. Ball, for the defendant.

CONSTANT F. DRURY *vs.* ROBERT NEWMAN.

An objection that an answer admits the allegations of the declaration must be deemed to have been waived, if it is first taken at the argument of exceptions to a ruling that the plaintiff could not maintain the action on the evidence offered at the trial without amending the declaration.

An action on a special contract of the defendant to pay the plaintiff the usual commissions for his services if he would procure a purchaser for property of the defendant, with a count on an account for "commissions for services as broker in getting a customer to purchase" the property, cannot be maintained without proof of a sale of the property, or of an agreement for the sale thereof binding on the defendant.

CONTRACT. The declaration alleged that the defendant, who was a tailor, requested the plaintiff, a broker, "to procure for the defendant a purchaser" of the lease of his shop, and the stock and fixtures, and the good will of his business, "and promised

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to pay the plaintiff the usual commissions for his services in procuring such purchaser," and that the plaintiff, "in conformity with such request, and relying on the promise of the defendant, went and procured a customer who would purchase the said lease, stock, fixtures and good will of the defendant at the defendant's price as he gave it to the plaintiff, and offered so to do," but that the defendant nevertheless refused to pay the plaintiff his commissions or any part thereof, and owed the plaintiff $175 "therefor;" with a count on an account annexed, for $175, for "commissions for services as broker in getting a customer to purchase" said lease, stock, fixtures and good will.

At the trial in the superior court, before *Lord*, J., the plaintiff offered evidence in substance as follows:

The plaintiff asked the defendant if he would "sell out," who replied that he would for $7000; and the plaintiff then introduced parties who desired to buy such a business as the defendant's, but the defendant refused to sell out to them. A few days afterwards the defendant said to the plaintiff: "If you will get those parties back I will give you $100 and pay you the highest commissions;" and the plaintiff then wrote, and the defendant signed, the following memorandum: "Mr. Newman will sell out for $4000 bonus, and stock and fixtures at prisal, and remain one year for $2000, with privilege of going into business out of the city." The day following, the plaintiff sent the parties above mentioned again to the defendant, who talked with them about selling out, but neither of them made any reference to the paper signed by the defendant; "and said parties supposed that they had come to an understanding, and then wrote a paper stating what they understood," namely, "that the defendant should have a bonus of $4000, and should sell his stock and fixtures at an appraisal, and have $2000 salary, or one third of the profits, at his option, for one year, and should not engage in the tailoring business in any shape whatever in Boston;" "and said defendant took his pen and dipped it in the ink, when he said that he must see his wife before he sold out, and afterwards sent word to said parties and the plaintiff that he would not sell."

The plaintiff testified, as an expert, "that he did not know

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that there were any usual commissions of brokers where no sale was made to the parties introduced, and that in this case no sale was made;" and further testified "that after the defendant refused to sell he went to the defendant's shop and said that after all his trouble he ought to have something, and asked the defendant if he would not give him something, and afterwards gave the defendant a bill for $350."

Upon this evidence, the judge ruled that the plaintiff could not maintain his action upon his declaration; that if, on the facts proved, the plaintiff was entitled to recover at all, it would be necessary to amend the declaration. The plaintiff declined to amend; a verdict was taken for the defendant; and the plaintiff alleged exceptions. It was stated in the bill of exceptions that the pleadings might be referred to by either party.

L. W. Osgood, for the plaintiff.

T. P. Proctor, for the defendant.

COLT, J. The point now made, that the defendant's answer admits the allegations in the plaintiff's declaration, was not suggested at the trial. Whatever its merits, it is not now available to the plaintiff. If the objection had been made in time, the defendant would not have been deprived of an opportunity to amend his answer.

The only question submitted is, as to the sufficiency of the evidence to support the declaration. Both counts seek to recover the usual commissions for services as a broker in procuring a purchaser for the unexpired lease of the defendant's store. Such commissions, by the plaintiff's own showing, were not due unless a sale was actually completed. No sale ever took place here. It may be that the plaintiff performed valuable services under a contract which the defendant prevented him from fully completing. No such claim is set forth here; and it is well settled that for such services he must declare specially, if the contract is still unrescinded.

The case of *Cooke* v. *Fiske*, 12 Gray, 491, is distinguishable from this, for there the agreement, which was for the charter of a vessel, was completed verbally, although not reduced to writing. It was obligatory, and the defendant might have enforced

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it. The plaintiff in that case was therefore entitled to his commission for procuring the charter. Here the evidence does not support the declaration.

It is unnecessary to consider whether the terms offered agreed with those proposed by the defendant or not; because there was never any binding agreement between the defendant and the proposed purchaser. *Exceptions overruled.*

WILLIAM SULLIVAN *vs.* JAMES M. THOMPSON & others.

In the receipt of an expressman for a package addressed to a consignee at a particular place in a certain city, the stipulation that the package "is to be forwarded to our agency nearest or most convenient to destination only" does not discharge the expressman from all liability other than for the safe delivery of the package at his own place of business in that city and its safe keeping there upon arrival; but, if he has agents there who habitually deliver such packages according to the special address of each, he is bound to deliver the package as it is specially addressed, according to the reasonable usages of his business; and a usage of expressmen, whenever packages arrive at their places of business specially addressed to consignees at establishments where many persons sojourn or are employed, to deliver them in the offices or counting-rooms of such establishments for the consignees to the clerks there in charge, and take the receipts of the clerks therefor, without giving notice to the consignees personally, is a reasonable usage, in respect to ordinary packages such as a box of clothing of the value of fifty dollars.

CONTRACT against the proprietors of Harnden's Express for the value of a box of clothing intrusted to them at Boston for transportation to Washington in the District of Columbia. Answer, that the box was duly delivered in conformity with the defendants' contract.

At the trial in the superior court, before *Wilkinson*, J., these facts appeared: The plaintiff was in the military service of the United States, and employed in a bakery of the commissary department of the army, on the corner of 23d and G Streets in Washington, where, at the time in question, from ninety to a hundred men were employed in the same manner, all of whom were boarded and lodged in the bakery, the business of which was carried on both by day and by night. By the military regulations for the conduct of the bakery, expressmen and other per-

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sons calling there on business were admitted only to an office which was at that time under the sole charge of a clerk named Francis M. Everett, who attended there from October 1862 to September 1865, "during a part of which period three other clerks, and the remaining part two other clerks, were there employed, and during the whole of which period it was the usage at said bakery, well known to all employed there, for the clerks at the office to receive all parcels brought to said bakery by expressmen or others for any of the men employed in said bakery, any such one of the clerks as might be present at the time, and least busy, receiving the same for the consignee and receipting therefor."

The plaintiff's box, (which, with its contents, it was agreed was of the value of fifty dollars,) marked "Wm. Sullivan, Government Bakery, corner 23d and G streets, Washington, D. C.," was delivered at Lowell to Sargent & Co., expressmen between Lowell and Boston, who transported it to Boston, and there delivered it on June 12, 1865, to the defendants, who received it upon an agreement or receipt, signed by their agent at Boston in their name, and by him given to Sargent & Co., the material part of which was as follows: "Received from Sargent & Co. one box, marked Wm. Sullivan, Washington, D. C., which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only." "Freight, $1.50." The defendants transported the box to Washington, and upon its arrival there, on June 14, it was delivered by John Y. Roseberry one of their delivery agents in Washington, to Everett, in the office of the bakery, at a time within the ordinary hours of business, and Everett received it for the plaintiff and gave Roseberry a receipt for it. The plaintiff was not present in the office at the time; nor was sent for; and the box never came into his hands.

The defendants offered to show, "that during the period while Everett was clerk at said bakery it was the uniform usage for all expressmen bringing parcels there, addressed to any of the men there employed, to deliver the same at the office to some one of the clerks therein at the time, taking his receipt therefor, without

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notice to the consignee;" but the judge excluded the evidence. The defendants also offered to show "that it is and ever has been the uniform, established and well known course of business and usage of the defendants as expressmen, and of all other express companies, when any parcel arrives at their office in Washington, or any other place, marked as this parcel was, not to leave it at their office to be called for, unless the parcel is expressly marked, 'To be left at the office till called for,' but to take such parcel immediately to the place denoted by the mark, or, when not so marked, to the place of residence, sojourn or business, at the time, of the consignee, and, if the place is an establishment wherein many persons then reside, sojourn or are employed, to deliver it at the office or counting-room of the establishment to the clerk or other person occupying the same at the time, delivering it to him for the consignee, taking the receipt of such person and giving no notice to the consignee, and treating this as a complete delivery; and that this course of business and usage was at the time well known to Sargent & Co." The judge excluded this evidence also; and directed a verdict for the plaintiff. The defendants alleged exceptions.

P. H. Sears, for the defendants.

C. Cowley, for the plaintiff.

CHAPMAN, C. J. The business of carrying goods by express is a branch of the carrying trade that has recently sprung up, and its rapid extension and increase is evidence of its great importance to the community. Sometimes expressmen act as carriers, and sometimes as forwarders, and sometimes they transport goods in vessels or other vehicles over which they have no control, but employ a servant of their own to take special charge of the goods. It is not necessary in this case to consider how far the responsibility of an express company may be varied when they act as carriers in their own vehicles, or in vehicles controlled in whole or in part by other parties, or when they act as mere forwarders; for the box in question was safely carried, and came into the possession of the defendants' agents at Washington. The question to be considered is, whether they have disposed of it properly.

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By their receipt, they agreed that it should be forwarded "to our agency nearest or most convenient to destination only." Its destination, as marked, was "Wm. Sullivan, Government Bakery, corner 23d and G streets, Washington, D. C." The plaintiff, being at that time in the military service of the United States, was employed in a government bakery situated at the corner of 23d and G streets. The defendants had at Washington a place where packages were received, and agents who were employed by them to deliver such packages in conformity with the usages of the company. The word agency in the receipt obviously includes not only the defendants' place of business, such as it was, but also their servants and teams employed to deliver packages; and the defendants were under obligation to cause this agency to be exercised, not only for the safe keeping of the goods upon their arrival at their place of business, but for their further carriage and delivery so far as their agency extended.

All their reasonable usages would enter into their contract, and become a part of it, and their liability would be limited by such usages. These usages consist in methods of doing business; and, when a party employs them to carry a package, and asks for no special stipulation, his implied proposal is, that they shall carry and dispose of the package in the same manner as they are accustomed to do with such packages, provided it be reasonable; and this is the proposal which they impliedly accept; and it constitutes the contract, except so far as it is varied by express stipulations. Some of their usages are adopted with reference to the compensation charged by them. It is important to the public that goods be carried as cheaply as possible; and, in order to meet this want, it is expedient to adopt usages which shall save expense. These usages may relate to the delivery of goods. The usage of the defendants in this respect is stated in the report. The only question that can arise respecting it is, whether it is reasonable. This must depend somewhat upon the character of the property to be delivered. If it were a heavy article, of no great value and which might safely be left exposed, it might be reasonable to leave it on the premises where the con-

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signee resides, in an exposed position. On the other hand, if it were a package of money, or article of similar value, it might not be reasonable to deliver it even at the office or counting-room of the consignee, without putting it in the care of some reliable person. In the present case it was a box of clothing. It was delivered within business hours at the office of the government bakery, which was the only part of the bakery where the defendants' agent could go, to a government clerk there employed, who alone occupied the office and had charge there, and who received the parcel for the plaintiff and gave a receipt therefor. This was in conformity with the well-known usage of the managers of the bakery, and with the usage of the defendants.

Considering the nature of the property, and the circumstances, the court are of opinion that the usage was not unreasonable, and that the defendants fulfilled their contract if they delivered the box in conformity with it. The evidence should have been admitted. *Exceptions sustained.*

CLARENCE E. GAY & others *vs.* JOHN D. BATES.

In an action for the rusting of the plaintiff's iron in the defendant's warehouse by its neighborhood to salt also stored there, the declaration alleged that the defendant received the iron for storage on the ordinary contract of a warehouseman; and the answer denied this, and alleged that it was received on a contract by which the plaintiff assumed all risk of its being injured by the salt. *Held*, that the burden of proof at the trial did not shift to the defendant upon his admitting that he received the iron and stored it where it was injured by salt; but was on the plaintiff throughout to establish the contract on which he relied, and not alone the particular facts from which he sought to deduce it.

In an action against a warehouseman for the rusting of the plaintiff's iron in his warehouse, a letter written by his servant (who had charge of the warehouse) to the plaintiff before the date of the writ, in which, after setting forth that there is a difference of opinion as to the condition of the iron, the writer proposes to allow to the plaintiff the amount of his claim in storage, on the ground that the writer is disposed to do what is just and right, deems it injudicious for either party to incur the expense of a lawsuit, and fears that if he should pay the claim "for a damage" it would involve him in trouble with his employer, is inadmissible in evidence as an admission of the defendant's liability.

CONTRACT. Writ dated September 16, 1867. The declaration alleged that the defendant was carrying on the business of

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warehouseman at Bartlett's Wharf in Boston, of which he was lessee, when the plaintiffs delivered to him fifty-five tons of iron, which he received for storage on the ordinary contract of a warehouseman, whereby he became bound to use reasonable care to preserve the iron from rusting; and that through his negligence the iron was rusted and injured. The answer admitted the receipt of the iron from the plaintiffs for storage; denied that it was received on such a contract as was alleged in the declaration; and alleged that, on the contrary, when the plaintiffs offered the iron for storage, the defendant replied that there was salt stored in the only warehouse where he had room for the iron, and the iron would be liable to become rusted if placed there, but the plaintiffs nevertheless requested him to receive the iron, saying that they would themselves assume all risk of its rusting from neighborhood to the salt; that he received it only on that condition, and under that agreement of the plaintiffs; that he was guilty of no negligence; and that the iron, if rusted, was rusted from its neighborhood to the salt.

At the trial in the superior court, before *Ames*, C. J., it appeared that the defendant was personally engaged in business elsewhere than at Bartlett's Wharf, and intrusted the whole management of his warehousing business at that place to William H. Nichols, the wharfinger, between whom and the plaintiffs the contract for storing the iron was made; but there was no evidence that Nichols had any authority from the defendant to settle claims for injuries to warehoused property. And it appeared also, and was admitted by the defendant, that the iron was received by him and stored in a warehouse containing salt, by neighborhood to which it was badly rusted and injured.

The plaintiffs offered in evidence, in the course of the trial, two letters addressed to them by Nichols under the dates respectively of January 22 and January 28, 1867. The first acknowledged the receipt from the plaintiffs of a bill for $580 for the injury of the iron; suggested that in this bill it was claimed that all the iron was injured, but that such was not the fact; mentioned previous letters of the plaintiffs as preferring a claim for only $495, and statements of the plaintiffs that appraisers

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did not agree in their estimates of the percentage of injury; and ended as follows: "Now, on account of these few circumstances, and others that I have at hand, I do not feel inclined to settle such a bill as that presented, thinking that it is out of reason, and not in equity at all with the existing circumstances, and will wait until further investigation." This letter the judge admitted; but excluded the second letter, (which was as follows,) upon the ground that it was an offer of compromise, although the plaintiffs stated "that they did not offer it to show the amount, but only the fact, of the defendant's liability:"

"In reply to your last, I would say that there seems still to be quite a difference of opinion as to the exact statements heretofore made, and condition of the iron at the time of taking it away from the wharf. But at the same time I am disposed to do exactly what is just and right between man and man, and do not think it would be judicious for either party to incur any more of an expense by going to law; and still I do not want to pay such an amount *for a damage*, as it places me in a bad fix with the lessees of the wharf, and therefore make this proposition to you, viz: to make Bartlett's Wharf indebted to you for amount of bill, and you to make up the amount in wharfage and storage on iron or any goods that you may send to us, at rates one quarter off the regular price. This is the easiest way for me, and to you makes no great difference in the long run, as you are constantly wanting storage room of some kind, and I have such as will accommodate you. I hope this proposition will meet your approval, and save us both all further annoyance."

On the question of the terms of the contract on which the iron was received by the defendant there was a conflict of testimony, each party introducing evidence which tended to prove that it was as alleged in the declaration or in the answer respectively. The plaintiffs contended "that, they having introduced proof of the reception of the iron and of its having been damaged, which facts were admitted by the defendant, the burden of proof was on the defendant to establish the contract as set forth in his answer;" and asked for a ruling to that effect. The judge did

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not so rule, but instructed the jury substantially as follows: "That the burden of proof was on the plaintiffs to show what the contract was under which the property was stored on the defendant's wharf; that proof of its delivery and acceptance would be *primâ facie* evidence that it was left there on such terms as to bring the defendant under the general common law liability of a warehouseman, responsible for reasonable and ordinary care, attention and skill in its storage; but that proof of such delivery to the defendant as a warehouseman did not of itself shift the burden of proof; and that it was for the jury to say, on all the evidence, whether the plaintiffs had shown by a preponderance of proof that the contract was such as in their declaration they had alleged."

The jury returned a verdict for the defendant; and the plaintiffs alleged exceptions.

H. F. Smith, for the plaintiffs. 1. The facts relied upon by the plaintiffs having been admitted by the defendant, and the latter relying upon a new and distinct proposition of fact (namely, the special contract for the storage of the iron at the plaintiffs' own risk,) to avoid it, the burden of proof was on the defendant to establish this new substantive fact. *Powers* v. *Russell*, 13 Pick. 69, 76, 77. *Delano* v. *Bartlett*, 6 Cush. 364, 366. *Gray* v. *Gardner*, 17 Mass. 188. *Randolph* v. *Easton*, 23 Pick. 242. *Kilburn* v. *Bennett*, 3 Met. 199. *Kingsley* v. *New England Insurance Co.* 8 Cush. 393, 404. *Thayer* v. *Connor*, 5 Allen, 25.

2. The letter of January 28 was not an offer of compromise; and, even if it was, it admitted independent facts, (namely, the defendant's liability, and the damage and fault in which such liability originated,) and therefore was admissible. *Marsh* v. *Gold*, 2 Pick. 285. *Gerrish* v. *Sweetser*, 4 Pick. 374. *Dickinson* v. *Dickinson*, 9 Met. 471. *Snow* v. *Batchelder*, 8 Cush. 513. *Harrington* v. *Lincoln*, 4 Gray, 563.

J. C. Gray, Jr., for the defendant, was not called upon.

Wells, J. Upon proof of the character of the defendant as warehouseman, and the delivery to and receipt by him of the iron for storage, the law, in the absence of other facts, would

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imply a contract upon the one side to pay a reasonable compensation, and on the other to keep safely and in a proper place, and to exercise reasonable care against injury to the deposit. These facts are admitted; but these facts are not the contract which is the cause of action. The contract is the legal inference from the facts; and that is put in issue by the pleadings. The inference of law furnishes to the plaintiff a *primâ facie* case, so far as proof of a contract is required; but it does not change the burden of proof. The defendant relies upon an express stipulation, at the time of the deposit, that he should not be responsible for injury from rust caused by the previous use of the storehouse for storing salt; and upon the fact that this condition of the place of deposit was known and acquiesced in by the plaintiffs. Of course, the defendant must produce some evidence of facts upon which he relies to limit or qualify his obligations. The effect of such evidence is, not to avoid, but to disprove the contract which the plaintiffs seek to deduce by inference from the circumstances of the deposit. The question is still the same: What is the contract to be implied from the facts? Is it such as to include the plaintiffs' alleged cause of action? That is the ultimate fact which the plaintiffs must maintain.

The letter of January 28 was rightly excluded. We can see no significance whatever in the letter except as a mere proposal of compromise. *Exceptions overruled.*

JOHN B. FOLGER *vs.* COLUMBIAN INSURANCE COMPANY & trustees.

To decree an absolute and final dissolution of a corporation at the suit of an individual is no part of the general jurisdiction of a court of law or of equity, and can be justified only by express statute.

In the suit, based on the N. Y. Rev. Sts. part 3, tit. 4, *c.* 8, art. 2, § 47, of a stockholder of a corporation chartered under the law of New York, against the corporation, for a violation of its charter in declaring and paying a dividend out of its capital stock, a decree of the supreme court of New York declaring the corporation dissolved is in excess of the jurisdiction of the court, and therefore entitled to no faith and credit in this Commonwealth as a judicial proceeding.

It seems, that, in a trustee process submitted to this court on an agreed statement of facts, a citizen of Massachusetts may, since the passage of the St. of 1865, *c.* 179, which author-

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ises the court to allow amendments changing a suit at law to a proceeding in equity, obtain payment of a debt due to him from a foreign corporation which has been dissolved, out of its property in this Commonwealth.

TRUSTEE PROCESS, by a citizen of Massachusetts against an insurance company incorporated under the laws of New York, and having an agent duly appointed under the Gen. Sts. *c.* 58, § 68, to receive service of process in Massachusetts, on whom service was made in this action; upon policies of insurance written by the defendant corporation at Boston on the plaintiff's interest in the ship Spark of the Ocean. Writ dated March 22, 1866. John L. Priest, one of the parties summoned as trustees, admitted in his answer the possession of funds belonging to the corporation. In the superior court George A. Osgood and Cyrus Curtiss appeared, by leave of court, on October 29, 1866, as claimants of these funds, in their capacity of receivers of the corporation by appointment of the supreme court of New York in an action brought therein by William H. Harbeck against the corporation. The case was submitted to the determination of the full court upon appeal from the judgment of the superior court on agreed facts; the trustee to be charged on his answer and the plaintiff to have judgment for the funds in the trustee's hands, if in the opinion of the court a judgment could be rendered against the corporation; but if the claimants had valid title to the funds as against the plaintiff, notwithstanding the admitted fact of a loss accrued within his policies, then judgment to be entered for the claimants accordingly. The substance of the facts agreed was as follows:

The complaint of the plaintiff in the action of Harbeck against the corporation was filed in the supreme court in New York on January 22, 1866; set forth that the plaintiff was a stockholder in the corporation; and prayed for a judgment for the dissolution of the corporation, for the appointment of receivers, and for an injunction on the officers and agents of the corporation against further prosecuting business, on the ground that the corporation had violated its charter in declaring a dividend and paying the same to the stockholders out of the capital stock, and not out of surplus profits. On January 23, 1866, the

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court appointed receivers as prayed for; on January 31 the corporation filed its answer to the complaint; and on February 2 the court, at the same time reappointing the former receivers "to wind up the affairs of the company in the manner provided by law," entered the following judgment: "The defendant having answered the complaint in this action, and judgment having been ordered upon the answer as frivolous, it is now, on motion of Dudley Field, counsel for the plaintiff, adjudged that the Columbian Insurance Company, the defendant herein, be, and it is hereby, dissolved."

Of this judgment for dissolution neither the plaintiff in the present action nor the trustee had any notice or knowledge; and they had no formal notice of the previous proceedings in Harbeck's action, although they "knew generally that receivers had been appointed."

It was agreed that the various orders of the court in New York for the appointment of receivers "were made under and by virtue of the N. Y. Rev. Sts. part 3, tit. 4, *c.* 8, art. 2, §§ 47, 48, 49, 51, and art. 3, §§ 77 *et seq.* which, together with any other laws of the state of New York bearing upon the subject, may be referred to," and that "by said orders of said supreme court, and by the laws of the state of New York, all the estate, real and personal, of said Columbian Insurance Company, which was in New York, or within the jurisdiction of said supreme court, passed to and vested in the receivers appointed in the original order hereinbefore referred to, and afterwards to and in the present claimants."

J. C. Dodge, for the plaintiff.

E. Bangs, for the claimants. 1. The decree of February 2 is conclusive evidence in this action of the fact of the dissolution of the corporation. Being a duly authenticated judgment of a court of another of the United States, it is in no case further examinable here than as to the jurisdiction of the court over the cause and the parties. *Bissell* v. *Briggs*, 9 Mass. 462. *Jacobs* v. *Hull*, 12 Mass. 25. *Commonwealth* v. *Green*, 17 Mass. 515, 545. *Hall* v. *Williams*, 6 Pick. 232, 246. *McRae* v. *Mattoon*, 13 Pick. 53. *Sheldon* v. *Kendall*, 7 Cush. 217, 219. *Carleton* v.

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Bickford, 13 Gray, 591. *Buffum* v. *Stimpson*, 5 Allen, 591. *Haggerty* v. *Amory*, 7 Allen, 458. *Mills* v. *Duryee*, 7 Cranch, 481. *Hampton* v. *McConnel*, 3 Wheat. 234. *D'Arcy* v. *Ketchum*, 11 How. 165. *Christmas* v. *Russell*, 5 Wallace, 290, 305. *Green* v. *Van Buskirk*, Ib. 307, 310. *Lazier* v. *Westcott*, 26 N. Y. 146. *Judkins* v. *Union Insurance Co.* 37 N. H. 470. The record is in itself evidence of the jurisdiction over the parties. The court being one of general jurisdiction will be presumed to have had jurisdiction of the cause, till the contrary shall appear. *Bissell* v. *Wheelock*, 11 Cush. 279. *Buffum* v. *Stimpson*, 5 Allen, 591.

There are no facts in the case tending to show that the court had not jurisdiction. On the contrary, it affirmatively appears, from the statutes and the decisions, that the supreme court of New York had a general jurisdiction over the subject matter of its proceedings in the suit in which this decree was passed. It was a court of general jurisdiction in law and equity; Const. of N. Y. art. 6, § 3; having especial jurisdiction over corporations by statute; N. Y. Rev. Sts. part 3, tit. 4, *c.* 8, art. 2, 3; and by the common law of the state; *Attorney General* v. *Utica Insurance Co.* 2 Johns. Ch. 371, 389; having the power to dissolve corporations, and being the only court in the world which has power to dissolve a New York corporation. *Merrick* v. *Van Santvoord*, 34 N. Y. 208. See also *Verplanck* v. *Mercantile Insurance Co.* 2 Paige, 452; *Bangs* v. *McIntosh*, 23 Barb. 599; *Howe* v. *Deuel*, 43 Barb. 504, 508; *Mann* v. *Pentz*, 3 Comst. 420. And this court is bound to give credit to the decree, under the general rule of law that, when any matter belongs to the jurisdiction of one court so peculiarly that others can only take cognizance of the same subject incidentally and indirectly, the latter are bound by the sentence of the former, and must give credit to it. Hargrave's Tracts, 452. *Perkins* v. *Fairfield*, 11 Mass. 227. *Thompson* v. *Tolmie*, 2 Pet. 163. *Blount* v. *Darrach*, 4 Wash. C. C. 657, 659. *Gorrill* v. *Whittier*, 3 N. H. 265. *Maingay* v. *Gahan*, 1 Irish T. R. 1, 53.

When a court has general jurisdiction over the subject matter of its proceedings, its doings, however erroneous, are not void. *Prigg* v. *Adams*, 2 Salk. 674. *Gorrill* v. *Whittier*, 3 N. H. 265,

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269. *Wood* v. *Peake*, 8 Johns. 69. *Butler* v. *Potter*, 17 Johns. 145. *Bangs* v. *Duckinfield*, 18 N. Y. 592, 595. This decree, therefore, even if it could be proved to be erroneous, must be held to have been authorized by the law of New York, and conclusive as evidence of the fact of dissolution, until shown to have been reversed. *Jacobs* v. *Hull*, 12 Mass. 25. *Hull* v. *Blake*, 13 Mass. 153, 157. *McRae* v. *Mattoon*, 13 Pick. 53. *Kempe* v. *Kennedy*, 5 Cranch, 184. *Thompson* v. *Tolmie*, 2 Pet. 157, 162. *Grignon* v. *Astor*, 2 How. 319. *Harvey* v. *Tyler*, 2 Wallace, 342. *Christmas* v. *Russell*, 5 Wallace, 290. *Fisher* v. *Bassett*, 9 Leigh, 119. *Cox* v. *Thomas*, 9 Grat. 323.

It was a proceeding *in rem*, and, as such, binding, not only on the parties actually litigating, but on all others. 1 Greenl. Ev. § 525. Broom Leg. Max. (3d ed.) 859, and cases cited. *Woodruff* v. *Taylor*, 20 Verm. 65. *Castrique* v. *Imrie*, 8 C. B. (N. S.) 1, 405. *Cammell* v. *Sewell*, 3 H. & N. 617, 645. *Castrique* v. *Behrens*, 3 El. & El. 709.

Besides, the decree of dissolution comes only incidentally in question here. Foreign judgments, and judgments of the courts of another of the United States, have been held, when they came incidentally in question, not to be examinable at all, but conclusive, even as against strangers. *Smith* v. *Lewis*, 3 Johns. 157, 168, 169. *Barney* v. *Patterson*, 6 Har. & Johns. 182, 202, 203. *Taylor* v. *Phelps*, 1 Har. & Gill, 492. *Andrews* v. *Herriot*, 4 Cowen, 520, note. *Rapelje* v. *Emery*, 2 Dall. 231. *Croudson* v. *Leonard*, 4 Cranch, 434, 441, 442. *United States* v. *Arredondo*, 6 Pet. 691, 729. *Tarleton* v. *Tarleton*, 4 M. & S. 20. *Houlditch* v. *Donegal*, 8 Bligh, (N. S.) 301, 341.

2. This was none the less a foreign corporation, dissoluble by the law of the state which established it, because it had an agent in Massachusetts; nor can we so apply our laws to it as to prevent or modify the consequences of its dissolution decreed by the law of that state. *Danforth* v. *Penny*, 3 Met. 564. *Blackstone Manufacturing Co.* v. *Blackstone*, 13 Gray, 488. *Williston* v. *Michigan Southern & Northern Indiana Railroad Co.* 13 Allen, 400. *Smith* v. *Mutual Life Insurance Co.* 14 Allen, 336. *Merrick* v. *Van Santvoord*, 34 N. Y. 208.

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3. The plaintiff in this action cannot have judgment against the dissolved corporation. *Greeley* v. *Smith*, 3 Story, 657. *Mumma* v. *Potomac Co.* 8 Pet. 281, 286. *Read* v. *Frankfort Bank*, 23 Maine, 318, 321. *Merrill* v. *Suffolk Bank*, 31 Maine, 57.

4. The trustee therefore cannot be charged; and the attaching creditor can have no remedy against the funds in his hands. The reason of the exception to the general rule respecting the transfer of personal property, made in this country against foreign assignees by judicial proceedings, fails; and this court will respect the right of the claimants to the property which was of the insolvent dissolved corporation. *Goodwin* v. *Jones*, 3 Mass. 517. *May* v. *Breed*, 7 Cush. 15, 42.

Gray, J. A corporation, being an artificial person, created by local laws, has no existence or powers beyond the jurisdiction of the state by whose laws it is created, except so far, and under such restrictions and conditions, as may be recognized and permitted by the laws and comity of other states. In this state, however, as in most others, a foreign corporation may make contracts within the scope of its charter, and may sue and be sued thereon. *Bank of Augusta* v. *Earle*, 13 Pet. 519. *Kennebec Co.* v. *Augusta Insurance & Banking Co.* 6 Gray, 208. *American Insurance Co.* v. *Owen*, 15 Gray, 491. By the Gen. Sts. *c.* 68, § 15, corporations created by any other state, having property in this Commonwealth, are liable to be sued and to have their property attached here, by trustee process or otherwise, in like manner as individual debtors residing in other states. *Ocean Insurance Co.* v. *Portsmouth Marine Railway Co.* 3 Met. 420. And by the Gen. Sts. *c.* 58, § 68, every foreign insurance company, before doing business in this Commonwealth, is required to appoint a citizen and resident thereof a general agent upon whom all lawful processes sued out by citizens of this state against the corporation may be served with like effect as if the corporation existed in this state, and to continue such agency while any liability remains outstanding here against the corporation. *Smith* v. *Mutual Life Insurance Co.* 14 Allen, 336.

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This trustee process is brought by a citizen of Massachusetts against a corporation established by the laws of New York, having an agent in this Commonwealth upon whom service was made, and owning funds in the hands of one of the persons summoned as trustees. The intervening claimants of those funds had been previously appointed, under the laws of New York, receivers of all the property of the corporation; and they rely, in support of their claim, upon a decree passed by the supreme court of New York, in the same suit in which they were appointed receivers, purporting to dissolve the corporation. They contend that this decree, having been made by a court of general jurisdiction, is conclusive evidence of such dissolution; that, if not thus conclusive, it was within the powers conferred upon that court by the statutes of New York; and that, in either view, the corporation had thereby ceased to exist before the process was commenced, and was not therefore liable to an action at law in this Commonwealth.

The article of the Constitution of the United States, which requires full faith and credit to be given in each state to the judicial proceedings of every other state, does not preclude the inquiry whether any judgment obtained in another state and relied on in this was rendered by a court having jurisdiction of the cause and of the parties. *Hickey* v. *Stewart*, 3 How. 762. *D'Arcy* v. *Ketchum*, 11 How. 165. *Carleton* v. *Bickford*, 13 Gray, 591. If the court was one of general jurisdiction, the presumption indeed is in favor of the validity of its proceedings. *Harvey* v. *Tyler*, 2 Wallace, 328. *Knapp* v. *Abell*, 10 Allen, 485. But this presumption is not conclusive; and it is always competent to show that the court had not jurisdiction of the cause. If it had not, there is no judicial proceeding; as in the case of an appeal of death brought in the English common bench, which is *coram non judice*. *Case of the Marshalsea*, 10 Co. 76 *b*. Especially is this the case when the action of the court is not in the exercise of its inherent general jurisdiction, but under a special power conferred by statute, its judgments in excess of which are void. *Thatcher* v. *Powell*, 6 Wheat. 125. *Shriver* v. *Lynn*, 2 How. 60.

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The supreme court of New York has indeed general jurisdiction in law and equity over persons and corporations. But general jurisdiction of suits against corporations no more implies a power to destroy a corporation at the suit of an individual than jurisdiction of private suits against individuals authorizes the court to entertain a prosecution for crime, to pass sentence of death, and to issue a warrant for execution. The only modes of dissolving a corporation, known to the common law, were, by the death of all its members; by act of the legislature; by a surrender of the charter, accepted by the government; or by forfeiture of the franchise, which could only take effect upon a judgment of a competent tribunal on a proceeding in behalf of the state; and neither a court of law nor a court of equity had jurisdiction to decree a forfeiture of the charter or dissolution of the corporation at the suit of an individual. *Boston Glass Manufacturing Co.* v. *Langdon*, 24 Pick. 52, 53. 2 Kent Com. (6th ed.) 305, 313, 314.

It becomes necessary therefore to examine the statutes of New York, which were cited at the argument, in order to ascertain whether the supreme court of that state had jurisdiction to render the decree of dissolution upon which the claimants rely. The statutes in question are contained in the third part, eighth chapter and fourth title of the fifth edition of the Revised Statutes of that state. By §§ 69–104, provision is made for the voluntary dissolution of a corporation upon the application of the directors, and for the appointment of receivers who shall be vested with all the property of the corporation in trust for the benefit of its creditors and stockholders.

The cases in which the appointment of receivers of the property of a corporation upon an adverse application is authorized by these statutes are of three classes. The first is, after a judgment at law or decree in equity has been obtained against any corporation, and an execution issued thereon and returned unsatisfied; in which case, upon the application of the judgment creditor, the supreme court may sequestrate the property of the corporation, appoint a receiver thereof, and distribute the same among all its creditors. §§ 44, 45. Secondly, whenever any

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corporation has remained insolvent or suspended its ordinary business for a year, it shall be deemed to have surrendered its franchises, and shall be adjudged to be dissolved, which adjudication might, in the opinion of Chancellor Walworth, be at the suit either of the attorney general or of any creditor or stockholder. § 46. *Ward* v. *Sea Insurance Co.* 7 Paige, 294. *Mickles* v. *Rochester City Bank*, 11 Paige, 118. Thirdly, whenever any banking or insurance company becomes insolvent or violates any provision of its charter or of other statutes, the supreme court, upon the application of the attorney general or of any creditor or stockholder, may by injunction restrain the corporation and its officers from exercising any of its franchises, from collecting debts, or paying out or transferring money or property, until the court shall otherwise order, and may appoint receivers, who shall be subject to the control of the court and have all the powers of receivers appointed upon the voluntary dissolution of a corporation. §§ 47, 51.

We cannot speak with the same confidence of the intention and the policy of the legislature of another state as we might of those of our own. But it is observable that the statutes in question do not in terms authorize a decree of dissolution of a corporation upon proceedings in equity instituted otherwise than by the voluntary application of its officers, except in the instance of a corporation which has failed to pay its debts or transact its business for a whole year, and which may therefore well be deemed to have ceased to exist for any useful purpose; widely differing from a mere neglect to pay one judgment debt, a temporary insolvency, or a violation of a single provision of a statute. The remedies afforded by all these sections to creditors or stockholders, by injunction, suspension of corporate powers, sequestration of property, appointment of receivers, and application of the assets of the corporation to the payment of its liabilities, may perhaps be considered as exercised under the general jurisdiction of the court, though modified, enlarged or regulated by statute. Such was the view taken by the court of appeals of New York of the proceedings in cases in which the corporation had failed to pay a judgment debt. *Bangs* v. *Duck-*

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infield, 18 N. Y. 592. But, according to the opinion of the same court, such proceedings did not dissolve the corporation. *Mann* v. *Pentz*, 3 Comst. 419, 420. To decree an absolute and final dissolution of a corporation at the suit of an individual is no part of the general jurisdiction of a court of law or of chancery, and can be justified only by express statute. The appointment of a receiver to take and distribute among the creditors and stockholders all the property of a corporation may with sufficient accuracy be called, as it was by Chancellor Walworth in *Verplanck* v. *Mercantile Insurance Co.* 2 Paige, 452, and *Bank Commissioners* v. *Bank of Buffalo*, 6 Paige, 503, "a virtual dissolution of the corporation;" but it does not extinguish its franchise, terminate its legal existence, or render it incapable of being sued, at law or in equity. *Coburn* v. *Boston Papier Maché Manufacturing Co.* 10 Gray, 243. *Taylor* v. *Columbian Insurance Co.* 14 Allen, 353.

It is not alleged or stated in the record produced in this case that the Columbian Insurance Company had remained insolvent or suspended its business for a year, as required to maintain an application under the forty-sixth section of the statute; but the suit is based upon the forty-seventh section, alleging a violation of its charter in declaring and paying a dividend out of its capital stock, instead of out of its surplus profits. That part of the decree, therefore, which declares the corporation to be dissolved, was apparently in excess of the jurisdiction of the court, and entitled to no faith and credit as a judicial proceeding. The corporation remained in existence, liable to suit and to attachment of its property or debts in this Commonwealth; and the right of the attaching creditor, being one of our own citizens, must prevail against the claim of the receivers appointed in New York; as was adjudged in *Taylor* v. *Columbian Insurance Co.* above cited.

It is by no means clear that, if the corporation could be held to have been dissolved according to the laws of New York, the receivers could maintain their claim in this case. There is a difficulty indeed in sustaining an action at law against an extinct corporation. *Mumma* v. *Potomac Co.* 8 Pet. 281. *Merrill* v. *Suffolk Bank*, 31 Maine, 57. But the dissolution of a corpo-

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ration cannot deprive its creditors or stockholders of their rights in its property; and if the common law affords them no adequate remedy, they may obtain relief in equity. *Bacon* v. *Robertson*, 18 How. 485–487, and cases cited. *Lum* v. *Robertson*, 6 Wallace, 277. By the Gen. Sts. *c.* 113, § 2, this court has jurisdiction in equity of suits by creditors to reach and apply in payment of a debt any property or right, legal or equitable, of a debtor, within this state, which cannot be come at to be attached or taken on execution in a suit at law against such debtor; and this provision has been held to extend to property of a foreign corporation. *Silloway* v. *Columbian Insurance Co.* 8 Gray, 199. By submitting this case to the judgment of the court upon an agreed statement of facts, the parties have waived any objection to the form of proceeding. *Cushing* v. *Kenfield*, 5 Allen, 307. *Rogers* v. *Daniell*, 8 Allen, 349. By the St. of 1865, *c.* 179, the court may allow amendments changing a suit at law into a proceeding in equity, if necessary to enable the plaintiff to sustain the action for the cause for which it was intended to be brought. There would seem therefore to be no difficulty in securing to the plaintiff in this case the payment of his debt out of the property of the corporation, even if it had been dissolved. But it is unnecessary to express a definite opinion upon that question, inasmuch as we are all of opinion, for the reasons already stated, that the corporation has not been dissolved, and that the plaintiff is entitled to *Judgment charging the trustee.*

CHARLES F. SMALL *vs.* FRANKLIN MINING COMPANY & another.

To pay an assessment laid on his shares in a corporation, the payee of two checks drawn on banks by third persons, payable to his order, for an amount exceeding in the aggregate the amount of the assessment, but neither check alone being equal thereto, indorsed the checks to the treasurer of the corporation, and said that they were "all right;" and the treasurer gave him a receipt for the assessment and paid him the balance in money. One of the checks was good when the payee took it, ten days before; but on the day when it was thus indorsed the drawer had failed, which the payee did not know till two days afterwards. The treasurer deposited the checks in bank for collection, and this

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one was returned in regular course of business, payment thereof having been refused. It was not protested, nor was any formal notice given to charge the payee as indorser; but four days after it was thus returned the treasurer sent it to the payee at his place of business in the same city, with a request for him to make it good, with which he refused to comply. *Held*, that the assessment was not fully paid.

BILL IN EQUITY filed October 17, 1867, for an injunction on the Franklin Mining Company, a corporation under the law of Michigan, and Charles Emery, its treasurer, against selling forty-five shares, owned by the plaintiff in its capital stock, for alleged nonpayment of an assessment of five dollars per share, or $225 in all, laid thereon by the directors, which the plaintiff alleged that he had paid. The answer (on which issue was joined,) denied full payment of the assessment by the plaintiff.

At the hearing, before *Wells*, J., it was agreed "that the defendants were entitled to proceed to sell the shares unless the transactions on June 18, 1867, should be held to have the effect of a payment of said assessment," which transactions appeared in evidence as follows: About four o'clock on the afternoon of that day the plaintiff called at the office of the treasurer of the corporation in Boston to pay the assessment, and presented to William F. Ward, the clerk then in charge in the absence of the treasurer, two checks payable to the order of the plaintiff and by him indorsed, drawn by Hubbard Brothers & Co. and John R. Williams respectively on banks in Boston. The check of Williams was for $201.20, and bore date of June 8, on which day it was received by the plaintiff from Williams in payment for goods sold, and had been held by the plaintiff ever since without presentment at the bank. The check of Hubbard Brothers & Co. was for $99.80. Ward testified: "I did not want to take the checks of outside parties. Small said it was all right, and I took it." Ward took the checks, and gave the plaintiff in return $76 in money, and the following receipt: "Boston, June 18, 1867. Received of Charles F. Small two hundred and twenty-five dollars, 6th assessment, Franklin Mining Co. Charles Emery, Treasurer, per William F. Ward." On June 8 Williams was in good business standing. On June 18 Williams failed, and his notes went to protest; but the plaintiff supposed the check to be good at that time, and did not hear of the fail-

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ure until June 20. On June 19 Ward deposited both checks in bank, and in regular course of business the check of Williams was returned, payment thereof having been refused. No protest of it was made, nor was any formal notice sent to the plaintiff as indorser; but a few days afterwards (on June 26, according to the testimony of the plaintiff; and, according to the testimony of Ward, four days after the check came back, and as soon as he found out the plaintiff's place of business,) a messenger was sent by the defendants to the plaintiff with the check, and with information that payment of it had been refused, and a request to make it good; with which request the plaintiff declined to comply. The plaintiff was a provision dealer in Boston, and his name and place of business were published in the city directory.

The case was reserved for the determination of the full court, on the bill, answer, and a report of the evidence; the preliminary injunction to be made perpetual, if the court should be of opinion that the defendants had no right to sell the shares for nonpayment of the assessment, otherwise the bill to be dismissed.

H. C. Hutchins, for the plaintiff. 1. Negotiable checks are deemed payment in Massachusetts, unless the contrary is shown. *Barnard* v. *Graves*, 16 Pick. 41. *Melledge* v. *Boston Iron Co.* 5 Cush. 158, 170. The check of Williams indorsed and delivered by the plaintiff was negotiable, and was in the nature of a new security to the defendants. The receipt of the defendants was absolute. The checks delivered were in excess of the amount due for the assessment; and, to the extent of such excess, must be considered as purchased by the defendants. The relations of the parties were thereby changed; and there was no claim upon the plaintiff afterwards, except by virtue of his indorsement of the check of Williams.

2. The defendants were under no obligation to take the check; but, having elected to do so, they became bound to present it seasonably for payment, and to give to the plaintiff seasonable notice of its nonpayment. Not having done this, they thereby made the check their own. *Taylor* v. *Wilson*, 11 Met. 44, 51.

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3. It is not pretended that the defendants now have any claim upon the plaintiff by virtue of his indorsement of the check. To permit them to sell the stock of the plaintiff would be to allow them to do indirectly what they cannot do directly.

J. M. Keith, for the defendants.

CHAPMAN, C. J. The plaintiff contends that his assessment has been paid by the indorsement and delivery of the check of Williams to the defendants' clerk, and the subsequent conduct of the clerk in respect to it. The plaintiff had held the check for several days without presentment or inquiry, believing it to be good, and represented to the defendants' clerk that it was all right. It was presented for payment on the next day, and this presentment was seasonable. The drawer had failed, and his paper had gone to protest on the day when the plaintiff passed it to the defendants' clerk. It was not therefore all right, as he represented it to be; that is, it was not a check which would be paid on due presentment at the bank. It was a different thing in substance from what either party supposed it to be; as much so as the bill of a broken bank which is passed and received as current.

The plaintiff was not entitled to such notice as must be given upon the dishonor of a bill of exchange. He was at most entitled to such reasonable notice as would save him from loss. It does not appear that the delay to give him notice, which was of a few days only, occasioned any damage to him, or that the value of the check was lessened.

There is no reason why the defendants should be enjoined from the collection of their assessment.

Bill dismissed, with costs.

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Thomas F. Meagher *vs.* James Driscoll.

A grantee who has buried the remains of his child in a lot in a cemetery, of which he holds possession under a deed from the proprietor which sets forth that such grantee is entitled to the lot, *habendum* to him and his heirs and assigns, to his and their use as a place of burial for the dead, may maintain an action of tort in the nature of trespass *quare clausum fregit* against the superintendent of the cemetery for disinterring and removing the remains therefrom, although the cemetery has never been licensed under the Gen. Sts. c. 28, § 5, for purposes of burial, and although the plaintiff's deed is on condition that the lot shall not be transferred without consent of the proprietor, and shall be subject to his regulations in the care and management of the cemetery; and in measuring damages the jury may take into consideration the injury of the plaintiff's feelings, if it appears that the defendant acted in wilful disregard or careless ignorance of the plaintiff's rights.

Tort in the nature of trespass *quare clausum fregit* for the removal of the remains of the plaintiff's deceased child from Lot No. 4 in Holyhood Cemetery in Brookline, on September 23, 1865. Answer, that the plaintiff had forfeited any right of burial which he ever had in that lot, and that the defendant removed the remains and buried them elsewhere in the discharge of his duty as superintendent of the cemetery.

At the trial in the superior court, before *Ames*, C. J., there was evidence that in December 1863 the plaintiff selected the lot on account of its neighborhood to a place where the remains of his father were buried; paid to the defendant (who was in charge of the cemetery as superintendent) five dollars towards the purchase of it, which was all that he was required to pay at that time; and soon afterwards buried there the remains of the child. The evidence was conflicting as to the length of credit given for the balance of twenty-five dollars due on the price of the lot; the plaintiff testifying that he was told to pay as soon as he could do so conveniently, and the defendant testifying that the sale was on condition that the balance of the purchase money should be paid in thirty days.

There was also evidence that in February 1865, by the direction of the plaintiff, who was then living in Woburn, his wife went to the defendant's house and paid the balance to the defendant's son, who was then acting as superintendent of the cemetery in the absence of his father by reason of sickness, and

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who delivered to her the following deed, and entered the transaction on the defendant's official records; and that in the following September the remains of the plaintiff's child were disinterred, and removed by the defendant to a lot known as a "charity lot," and there buried in a grave containing two other bodies.

"Holyhood Catholic Cemetery. Brookline, Mass., Dec. 6th, 1863. Mr. T. F. Meagher, having paid thirty dollars, the receipt whereof is hereby acknowledged, is entitled to one Lot, No. 4, in Holyhood Cemetery, to have and to hold the same to said Meagher, his heirs and assigns, to his and their use as a place of burial for the dead; yet upon the following conditions, to wit: That said lot shall not be transferred without the consent of the proprietor; shall be subject to the regulations made or to be made in the care and management of said cemetery by the proprietor, who shall also have the right to prevent the erection of any offensive or improper monument or inscription thereon; that no remains shall be deposited therein for hire; and that persons dying in drunkenness, duel, or by selfdestruction, unbaptized, non-Catholics, or otherwise opposed to the Catholic Church, shall not be there interred. In case of a violation of any of the foregoing conditions, said premises shall revert to me, the said proprietor, my legal heirs and assigns. Three dollars will be charged for every opening of graves after the first. Jos. M. Finotti. Witness, James Driscoll. Lot No. 4, Walk A, Left. By instrument recorded February 1st, 1858, lib. 262, fol. 267, in the Dedham Registry of Deeds, the cemetery is bonded to the Rt. Rev. J. B. Fitzpatrick, Bishop of the Diocese of Boston."

The defendant introduced evidence that, when he recovered from his sickness and resumed his duties, not knowing that the lot had been paid for, he made inquiry for the plaintiff's residence and wrote several letters to give him notice that the lot would be sold to another person unless it should be paid for; that, not hearing from the plaintiff, nor receiving any answer to his letters, he sold the lot to another person, and removed the body. There was a conflict of evidence as to the condition of

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the lot to which it was removed, some witnesses representing it as wet and marshy, but the majority as being unobjectionable, and not materially different from the other lots.

It appeared "that the cemetery was first opened in August 1857, and that the title to the various lots or rights of burial proceeded from the Reverend Joseph M. Finotti, (whose title was not controverted,) by instruments in same form" as the deed quoted. No evidence was offered of any permission from the town of Brookline to make burials in the cemetery, and the defendant insisted that for that reason the plaintiff was barred by the Gen. Sts. *c.* 28, § 5, from maintaining the action; but the judge ruled otherwise.

The defendant then contended "that, as the action was an action for trespass on real estate, the plaintiff could at all events only recover for the actual damage done to such real estate; and that, the alleged trespass on the lot and removal of the body not being wilful or with wrongful intent, but wholly from accident and mistake, the plaintiff for that reason also would be restricted to nominal damages only;" and further, that he could not recover at all, because the execution of the deed quoted, and the payment therefor to the defendant's son, did not invest him with a title which would support the action. But the judge ruled "that, as the plaintiff was in possession of the lot, having selected and taken the instrument usually given to purchasers of lots, and was holding and using the lot for the purposes and in the manner intended by the terms of the instrument, he was entitled to maintain the action; that, if it appeared that the defendant had acted in the removal of the body of the child either with a wilful disregard of the plaintiff's rights, or under a mistake arising from gross carelessness and want of ordinary attention or diligence in making proper inquiry, and with the opportunity, by means of his records or by inquiry, to know that the plaintiff had paid for the lot, the jury in assessing damages would have a right to consider the injury to the plaintiff's feelings, and would not be restricted to the mere pecuniary loss or damage to his property."

The jury returned a verdict for the plaintiff, assessing dam-

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ages in the sum of $837.50; and the defendant alleged exceptions.

A. Russ, for the defendant.

R. D. Smith & W. Emery, for the plaintiff, were not called upon.

Foster, J. By the common law, "though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains when dead and buried. The person, indeed, who has the freehold of the soil may bring an action of trespass against such as dig and disturb it; and if any one, in taking up a dead body, steals the shroud or other apparel, it will be felony, for the property thereof remains in the executor or whoever was at the charge of the funeral." 2 Bl. Com. 429. *Corven's case*, 12 Co. 105. *Haynes's case*, Ib. 113. 3 Inst. 202. *The King* v. *Lynn*, 2 T. R. 733.

A dead body is not the subject of property, and after burial it becomes a part of the ground to which it has been committed, "earth to earth, ashes to ashes, dust to dust." The only action that can be brought for disinterring it is trespass *quare clausum*. But any person in the actual possession of land may maintain this action against a wrongdoer. *Barnstable* v. *Thacher*, 3 Met. 243. The title of the plaintiff was more than a burial right in soil the freehold and possession of which remained in another. The written instrument from Father Finotti, the owner of the fee, conferred a right to the exclusive occupation of a particular lot.

We cannot presume that land actually devoted to the purposes of a cemetery is not legally so used, from the absence of evidence that the burial ground had been licensed by the municipal authorities. No such defence is set up in the answer; or is open to a mere trespasser, who, without any legal authority, undertakes to disturb another in the use he makes of land of which he is in peaceable possession. The present action is therefore maintainable upon the count in the nature of trespass *quare clausum*.

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The measure of damages was correctly stated. The gist of the action is the breaking and entering of the plaintiff's close. But the circumstances which accompany and give character to a trespass may always be shown either in aggravation or mitigation. *Bracegirdle* v. *Orford*, 2 M. & S. 77. *Merest* v. *Harvey*, 5 Taunt. 442. *Brewer* v. *Dew*, 11 M. & W. 625. He who is guilty of a wilful trespass, or one characterized by gross carelessness and want of ordinary attention to the rights of another, is bound to make full compensation. Under such circumstances, the natural injury to the feelings of the plaintiff may be taken into consideration in trespasses to real estate as well as in other actions of tort. Acts of gross carelessness, as well as those of wilful mischief, often inflict a serious wound upon the feelings, when the injury done to property is comparatively trifling. We know of no rule of law which requires the mental suffering of the plaintiff, or the misconduct of the defendant, to be disregarded. The damages in such cases are enhanced, not because vindictive or exemplary damages are allowable, but because the actual injury is made greater by its wantonness.

Exceptions overruled.

JOHN M. SCHWOERER *vs.* BOYLSTON MARKET ASSOCIATION.

The owners of a lot of land, by deed reciting that it was found necessary that a passageway twenty feet wide should be laid out and kept open over their lot for the accommodation of an adjoining parcel of land, granted for a valuable consideration to the owners of said parcel, their heirs and assigns, these rights, privileges and easements, namely, that a strip of the grantors' lot, twenty feet wide, and adjoining the grantees' parcel through its whole length, "shall not be subject to have any fence or building erected thereon," and that the owners of the parcel, and the future proprietors or occupants thereof, or of any part thereof, "shall have the right to the use, in common with" the said grantors, "of the said spaces of twenty feet wide for the accommodation of their said land or estates bounding thereon." *Held*, that the owner through mesne conveyances from said grantees of one of the lots into which their parcel was afterwards divided, was entitled, as appurtenant to his estate without express mention thereof in said deeds of conveyance, to have the strip of land twenty feet wide kept open to the sky; and might maintain a bill in equity against said grantors to prevent the erection by them of a building over said strip, though so planned as to leave a passageway more than fifteen feet high under itself, and to be supported upon buildings owned by said grantors adjoining said strip on either side thereof.

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Schwoerer v. Boylston Market Association.

The proprietors of a lot of land granted such rights in a strip of it that the several owners of lots into which an adjoining parcel of land was afterwards divided became entitled to have the strip kept open to the sky; and one of said owners filed a bill in equity to restrain said grantors from constructing a building over the strip between buildings which they owned adjoining the strip on either side thereof. *Held*, that if, during the pendency of such a suit in equity, such a building should be erected by said grantors, in pursuance of a contract made by them, before the filing of the bill, with parties who, while the suit was pending, became lessees of said adjoining buildings, an effectual decree could be made for its removal without making the lessees parties to the bill, although the answer of the grantors alleged that they had "a contract for a valuable lease of the said buildings which requires them to erect said connecting structure, and that to be deprived of it would be a great and serious detriment to them." *Held, also*, that it was not necessary to make the owners of the other lots into which the parcel was divided parties to the bill.

BILL IN EQUITY, filed September 12, 1866, to restrain the defendants from constructing a building of the nature of a bridge across Boylston Square in Boston.

The bill alleged that on April 19, 1809, the defendants, owning a lot of land on the corner of Boylston and Washington (then Orange) Streets, (which lot was conveyed to them on the previous day by Ralph I. Reed and Joseph C. Dyer out of a large parcel of land, of the rest of which, adjoining the lot granted to the defendants on the south and west, Reed and Dyer continued owners in fee simple,) executed to Reed and Dyer a deed, which was duly recorded on the same day and contained the following clause:

"Whereas the said Reed and Dyer are proprietors of the land adjoining the said association's land, as above described, and it is found convenient to the parties and necessary for the accommodation of the said Reed and Dyer's land aforesaid that a passageway of twenty feet wide adjoining the same be laid out and kept open on the said association's land aforesaid; now be it known that, in consideration of the premises, and of the sum of two thousand seven hundred and thirteen dollars and fifty cents paid by the said Reed and Dyer, the receipt whereof the said association do hereby acknowledge, the said association do hereby give, grant, sell and convey to the said Reed and Dyer, their heirs and assigns, the rights, privileges, easements and benefits following, to wit: that all that part of the said association's land above described, which lies between the said southerly and westerly bounds thereof and two lines drawn parallel thereto, at a dis-

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tance of twenty feet (the one line northerly and the other easterly) therefrom, shall not be subject to have any fence or building erected thereon; and that the said Reed and Dyer, and the future proprietors or occupants of said adjoining land, now owned by said Reed and Dyer, and of any part or parts thereof, shall have the right to the use in common with the said association of the said spaces of twenty feet wide, for the accommodation of their said land or estates bounding thereon; provided that they, the said Reed and Dyer, or future proprietors of their said adjoining land or estates, shall not in any manner interfere with or obstruct the operation or effect of any by-laws or regulations which said association shall make and ordain; and provided also that the said Reed and Dyer shall make a sidewalk of five feet wide into said passageway, and pave a strip of five feet wide adjoining said sidewalk, and that the future proprietors of the estates aforesaid, now owned by said Reed and Dyer, adjoining the said twenty feet passageway, shall keep in good repair, at their own expense, the said sidewalk and five feet of pavement adjoining the same, comprising one half part of said twenty feet passageway; and the said Reed and Dyer shall be permitted to have steps projecting one foot in width from their said estates into said sidewalk."

The bill further alleged, that the provisos of this clause had always been complied with, and the spaces twenty feet wide therein described had ever since been used, without obstruction, by the public as well as the owners of the land bounding thereon, and had become known as Boylston Square; that on May 1, 1857, the plaintiff, through mesne conveyances from Reed and Dyer, became and had ever since been owner in fee simple of a lot of land, with a brick dwelling-house thereon, bounding on Boylston Square, with all the rights, easements, privileges and appurtenances thereto belonging; that all the rights, as to this lot of land, which Reed and Dyer acquired by the defendants' deed to them of April 19, 1809, became thereby vested in the plaintiff on May 1, 1857, and had belonged to him ever since; and that the defendants, in violation of these rights and against the plaintiff's remonstrance, had begun to construct

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a building at some height above the ground, across Boylston Square at the entrance thereof from Washington Street, which building would impair ingress to and egress from Boylston Square, and obstruct the view of and from the plaintiff's lot, and lessen the value of the lot.

The prayer was for an injunction on the defendants against erecting such a structure; and for general relief.

In their answer, the defendants demurred to the bill on the ground that the case stated was not one which entitled the plaintiff to relief in equity; and, further answering, admitted their ownership by purchase from Reed and Dyer on April 18, 1809, of the lot on the corner of Boylston and Washington Streets, and of their deed of April 19, 1809, to Reed and Dyer, as above quoted; alleged their purchase, and ownership for many years, of a piece of land fronting on Washington Street, (which also formed part of the original parcel of Reed and Dyer,) so that at the entrance of Boylston Square from Washington Street they were owners of both the lots of land, and of the buildings thereon, between and affixed to which the structure complained of was in process of erection; described this structure as a covered passageway, twelve feet high, built fifteen feet and nine inches above the ground; alleged also that they "have a contract for a valuable lease of the said buildings which requires them to erect said connecting structure, and that to be deprived of it would be a great and serious detriment to them;" admitted the plaintiff's ownership of a lot of land on Boylston Square; alleged that the structure in no way diminished the value of the plaintiff's premises; "that the nearest part of said elevated passage is distant from the nearest part of the premises of the plaintiff not less than one hundred and seventy-five feet; that it does not, and cannot in any manner whatever, obstruct the use of said strip of land [Boylston Square] as a passageway, or impede the circulation of air, or intercept therefrom the rays of light; that not a single ray of light passing to the premises of the plaintiff is in any manner interfered with by the same; that the premises of the plaintiff have their common and most usual and largest access, as well as abundant air and light, from that part

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of said strip of land which connects them with Boylston Street, and are in no manner prejudiced in these particulars by said structure, and that said structure leaves Washington Street in full and unimpeded view of the premises of the plaintiff, and in fact only screens from the view thereof a small portion, to wit, twelve feet square of the upper story of a building on the opposite of Washington Street, distant two hundred and fifty-six feet from the premises of the plaintiff, the view of which can be of no consequence or value to the premises of the plaintiff, and the screening of which only constitutes one of those limitations of prospect which must be reasonably considered as necessarily incident to a crowded city."

The answer further denied that, by the true construction of the clause quoted from the defendants' deed of April 19, 1809, to Reed and Dyer, any such rights were conferred on the plaintiff as were preferred in his bill, and alleged that the clause "was intended and understood by the parties to confer, and did in law and fact confer, only such easement or right of passage in the strip of land therein described as was necessary for the accommodation of said adjoining land," and no right of prospect or view whatever. It also denied that the provisos of that clause had been complied with; and that the sidewalks and pavement had ever been constructed or kept in repair as therein provided. And it alleged that since April 19, 1809, the defendants erected a wooden structure in the same place with that complained of, and having substantially the same effect on Boylston Square, and maintained it for more than twenty years, and until within twenty years before the filing of the bill, without objection from anybody and with the full knowledge and acquiescence of the owners of the land bounding on Boylston Square.

The plaintiff filed a general replication, and at the hearing, before *Gray*, J., offered to prove, on the points at issue, the compliance by Reed and Dyer, and the subsequent proprietors of their land bounding on Boylston Square, with all the provisos of the defendants' deed of April 9, 1809; that all the rights, easements, privileges and appurtenances which by that deed

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were attached to the lot of land of which he became owner on May 1, 1857, then vested in him, and ever since belonged to him; that ever since May 1, 1857, he had occupied the house on his lot as a residence for himself and his family, and as a boarding house; that the house covered the whole front of the lot, was three stories high, and had no means of access in front except through Boylston Square; that there had been no obstruction to the free use of Boylston Square by the owners of land bounding thereon and by the public, ever since April 19, 1809; that before the filing of the bill he served on the defendants a written remonstrance against the erection of the structure which they had commenced to build; that this structure was planned to be twenty-six feet and six inches deep from the entrance of Boylston Square, fifteen feet and nine inches above the ground, and one story high; that at the time of the filing of the bill the defendants had made no further progress with it than to lay one or two joists across the Square, between the buildings at the entrance thereof, but had since made much further progress; that the structure would greatly lessen the value of his house and land, which prior to the beginning of the erection was upwards of $15,000, and would obstruct the view of and from the house, prevent the ingress or egress through Boylston Square of anything more than fifteen feet and nine inches high, and greatly incommode the plaintiff. And this offer of proof was accompanied by a plan of the premises, the accuracy of which it was agreed might be considered as proved for the purposes of the hearing, in which the relative situation of the proposed structure was represented substantially as in the following diagram, in which the land of the plaintiff is marked with his name; the land reserved by the defendants, after setting off Boylston Square, out of the lot conveyed to them by Reed and Dyer on April 18, 1809, is marked with the figure 1, and the land afterwards acquired by them with the figure 2; and the position of the proposed structure is designated by dotted lines. The distance from Washington Street to the corner of Boylston Square was represented as two hundred feet, and of that corner from Boylston Street one hundred and twenty feet.

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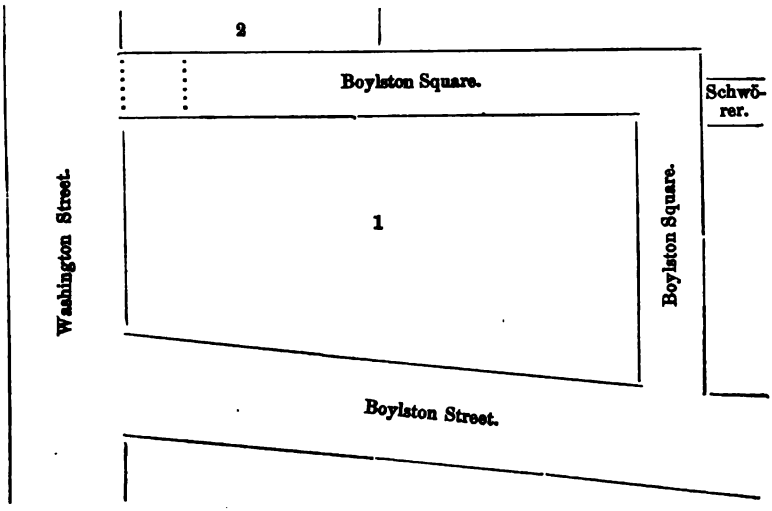

The case was reserved, on the pleadings and this offer of proof, for the consideration of the full court; the bill to be dismissed if it could not be maintained thereon, but if otherwise, the case to stand for hearing; and was argued in March 1867.

J. D. Ball, for the plaintiff. The deed of 1809 created in favor of all the adjoining land of Reed and Dyer a perpetual servitude in Boylston Square. *Parker* v. *Nightingale*, 6 Allen, 341. *Hubbell* v. *Warren*, 8 Allen, 173. *Whitney* v. *Union Railway Co.* 11 Gray, 359. This servitude was not merely a right of way, but was a use in common for all purposes. It was expressly provided that no fence or building should be erected on the Square. The circumstances and condition of things then existing show that Reed and Dyer required something more than a mere right of way. They owned a large and valuable tract of land adjoining the defendants, extending to a distance from Washington and Boylston Streets. They could in no way get a frontage for their rear land, except by laying out an open area on their own land, or procuring one to be laid out over the defendants' adjoining land. It cannot be supposed that either party then thought that the subject of the purchase and grant was a mere right of a way which might be covered or built over

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at any time. A large sum of money was paid for the deed. Its language is comprehensive and unrestricted. If the defendants have a right to erect the particular structure in question, they may build up to the plaintiff's house. The plaintiff can have no adequate remedy at law for an injury like this.

R. F. Fuller, for the defendants. The object of the deed was plainly stated to be to lay out a passage. This object throws light on the meaning of the language of the granting part of the deed. That part provides that no fence or building shall be erected *on* the land. The various conditions are such as the law annexes to the use of a way. *Prescott* v. *White*, 21 Pick. 341. The grantees are to make a sidewalk and keep it in repair. The structure complained of does not rest on the soil; but is suspended like a bridge between the buildings on both sides of Boylston Square. There is no averment that sufficient room is not left for all manner of vehicles to approach the plaintiff's house. The prospect can only be slightly impeded. But, by the true construction of the deed, no right of prospect is granted thereby. And rights of prospect in cities are not favored by the policy of the law. *Parker* v. *Foote*, 19 Wend. 309, 318. The structure does not impair the right of passage. The defendants retained all rights not necessary and convenient for the purposes of the grant; including the right of erecting a structure like that now contemplated. *Atkins* v. *Bordman*, 2 Met. 457, 467, 468, 474.

Foster, J.* The deed from the Boylston Market Association to Reed and Dyer, under which the plaintiff's title is derived, grants to them and their heirs and assigns, as to all that part of the association's land which is the passageway now in dispute, the right that it "shall not be subject to have any fence or building erected thereon."

In the opinion of the court, this language requires that the entire space of the passageway shall be kept open and unobstructed by any building. It is not the case of a mere right of way where the owner of the soil may do any acts which do not

* Gray, J., did not sit at the argument.

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interfere with the enjoyment of the easement; but it is a right to have the entire court or passageway kept open to the sky. This may be beneficial to the plaintiff's estate, not only as a way, which was doubtless the chief use contemplated by the parties to the deed, but also for light, air and prospect, and every other accommodation and advantage which such an open court might furnish to an estate abutting upon it.

We cannot distinguish in this case between the obstruction of a building on the ground and one fifteen feet above. Either would for many purposes injure every estate on the passage. It is plain that dwelling-houses or other buildings on a court in a city are more valuable where the court is not arched or built over at its mouth, than where it is entered by passing under cover of a building. The right to have the entire space kept open and not built upon is one that equity will protect; and the

Case must stand for trial.

After this decision, the case was referred to a master to take and report the evidence, upon whose report and the pleadings the case was submitted to the full court for final determination at the present session.

The testimony reported related, 1. to the completion of the structure; and 2. to the relations of the defendants with Buckley & Bancroft, a copartnership with which it appeared that prior to the filing of the bill the defendants made the contract mentioned in their answer as requiring the erection of the structure complained of. The substance of all which is material on these points is stated in the opinion. It further related, 3. to the plaintiff's title under the mesne conveyances of his lot from Reed and Dyer; and on this point it appeared that in several of the deeds, (including the deed of May 1, 1857, from Jacob Sleeper to the plaintiff,) no express reference was made to Boylston Square except as a boundary, nor to any rights therein as appurtenant to the granted premises except as included under such a general phrase as "with all the rights, easements, privileges and appurtenances thereto belonging." Finally, the testimony reported related, 4. to the question whether there had been

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a forfeiture of the plaintiff's rights, if any, by noncompliance with the provisos of the defendants' grants, or whether any neglect in that respect had been waived by the defendants; and 5. to the question whether the defendants had not obtained by prescription a right to maintain the structure over Boylston Square, by reason of the previous maintenance of certain large signboards in substantially the same position.

J. D. Ball, for the plaintiff.

P. W. Chandler & R. F. Fuller, for the defendants.

Colt, J. Upon the plaintiff's offer to prove the facts stated in his bill, it was held at a former hearing that the deed from the defendants to Reed and Dyer, under whom the plaintiff claims title to a part of the land adjoining the strip or passageway therein described, conveyed the right to have the passage kept open to the sky; and that this bill might be maintained to prevent the erection of a building or suspended bridge over it, though supported by the adjoining buildings solely, and leaving a passage fifteen feet high under the same.

Under this decision, the parties proceeded to take evidence in support of the allegations in the bill and answer. It now appears that on July 1, 1866, the defendants entered into a contract with Buckley & Bancroft, by which they agreed to lease to them for a term of years the premises adjoining said strip on both sides thereof and fronting on Washington Street, to put the same in good tenantable condition, to construct at their own expense a covered way or bridge four or five feet wide across said passageway, and to permit Buckley & Bancroft to put up a counting-room on the east side thereof at their expense, if they should choose to do so; Buckley & Bancroft on their part agreeing to take possession of said premises as soon as they should be made ready for occupancy, and to sign and execute leases of the same on the terms therein set forth.

This bill was filed September 12, 1866; and on the first of November following a lease of the premises named in the contract of July 1, together with the counting-room and passageway, which had then been erected, was executed. The structure extending across the twenty feet strip or way was one story

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high, covering the same for a distance of twenty-six feet back from Washington Street, and leaving a space under it fifteen feet high.

Upon this state of facts, it is claimed that this bill must now be dismissed for want of necessary parties; and that Buckley & Bancroft should have been made defendants. As a general rule, in equity proceedings, all persons materially interested must be made parties either plaintiff or defendant, in order that a complete and final decree may be made, and a multiplicity of suits prevented. An objection to the nonjoinder, if deemed necessary by the defendant to his own protection, and when apparent on the face of the bill, is taken by demurrer, or otherwise by plea or answer setting forth the facts by which other persons named therein are made necessary or proper parties. If the defendant does not for any reason think fit to take the objection before, the defect may be availed of, to a limited extent, at the final hearing upon the pleadings and proof. But, when thus delayed, the objection receives far less favor from the court, and its allowance is said to depend to some extent upon sound discretion. If there be an omission of an indispensable party, so that a complete decree cannot be made without him, the court will itself, *ex mero motu*, take notice of the fact, and direct the cause to stand over, in order that such new party may be added; or dismiss the bill, when the plaintiff is chargeable with laches. In such cases, it must appear that the decree will have the effect of depriving the party omitted of his legal rights. Where the defect is formal and technical merely, and is only objected to at the hearing, and especially if other parties are needed only for the defendant's protection, the decree will not be delayed if the nonjoinder produces no other prejudice to the rights of parties before the court. It is the familiar rule that some defences cannot be made in all stages of the cause with equal effect, but will be regarded as waived when expense and delay have been incurred which might have been avoided.

In this case, we are of opinion that there is no rule governing courts of equity, in administering the relief peculiar to their jurisdiction, which requires us to delay final relief on account

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of the nonjoinder of Buckley & Bancroft. At the time of the filing of this bill they were only parties to a contract with the defendants, one stipulation of which was that the defendants should erect a structure over the passageway in question for their future use in connection with premises agreed to be leased. They then had no legal interest in the proposed building; were not at that time concerned in its erection; and the plaintiff then had no knowledge of the contract. Their rights are to be settled under this executory contract. The fact that they afterwards became lessees in pursuance of its terms does not affect the question. All leasehold or other titles acquired *pendente lite* are affected with notice; and parties claiming such titles need not be joined, but are bound by the decree. It is plain that the defendants' contract with third persons to erect a building for their future use in a place where they have no right to build does not imperatively require that such third parties should be made defendants, in a bill brought for its removal before they have taken possession and entered upon its use, and when the objection of nonjoinder is first made at the hearing. However proper it may have been to have joined them originally, they are not now indispensably necessary. Their legal rights are not affected by the decree, but remain unimpaired, if they have any, under the contract. They are not required to be joined on the ground that no effectual decree can be made against them; because a decree ordering the removal of the obstruction will afford adequate and complete relief, and can be enforced without naming them or requiring any act on their part.

The statement in the answer, of the existence of a contract in general terms for the erection of this structure, without stating it to be in writing, or with whom or where made, or that it was made before the filing of the bill, is to be regarded rather as an inducement to the defendants' claim of injury, and is not, as suggested, a proper mode of raising the objection of a want of parties. A general demurrer with nothing in the bill to disclose the defect of course cannot aid the defendants.

There is another rule often laid down which leads to the same result. In a suit brought against a party whose title to real es-

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tate is disputed, the occupying tenants or lessees claiming possession under him are not deemed necessary parties, upon the ground that their rights are in some sort represented and so far protected. Story Eq. Pl. § 151.

The further objection, that the other persons who have become owners of lands adjoining the passageway, and who have the same privileges, are not joined, cannot prevail, for the reason above stated; and for the further reason that such owners have distinct and several interests. The rule requiring all parties having a community of interests to be joined, or proper reason shown for the nonjoinder, does not apply, even if that rule would be enforced when the defendant does not suggest the defect in his pleading. The remedy applied will obviate the need of any further litigation by other parties having similar rights. 1 Dan. Ch. Pr. (3d Am. ed.) 305, note. Story Eq. Pl. §§ 74 *a*, 116 note, 279, 534, 535. *Townsend* v. *Auger*, 3 Conn. 354.

It is further claimed that the plaintiff fails in his evidence to show any title, under the grant to Reed and Dyer, to demand the removal of the obstruction. By acquiring title to the premises occupied by him bounding on the passageway, he became entitled to the use of the way, by virtue of the original grant as therein defined, as appurtenant to his estate, even though the words privileges and appurtenances had not been added in his deed. To ascertain the extent and character of the incorporeal right to which he thus acquired title, resort is had to the terms of the original grant. The agreement not to make erections in the passageway was not, it is true, technically a covenant running with the land. There can be no covenant running with the land, it is said, where no land, but only an incorporeal hereditament, is granted. *Hurd* v. *Curtis*, 19 Pick. 459. But this is not an action upon the covenant. The defendants had the right to put such restrictions and limitations upon their own estate, in favor of adjoining estates, in granting this right of way, as they chose. And courts of equity, in determining the rights of the parties, will ascertain the intention by all the provisions and stipulations made. Between the original parties only, the agreements and stipulations may be enforced at law. But in equity those claim-

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ing title under them may resort to the whole instrument, including the covenants and agreements in gross, for the purpose of ascertaining the nature of the right intended to be conveyed; and, when ascertained, the court will enforce, in favor of such persons, that use or mode of enjoyment which the grantor has seen fit to impress upon it. The effect of a grant will thus be given to that which is in the form of an agreement binding at law only between the original parties. *Whitney* v. *Union Railway Co.* 11 Gray, 362. *Parker* v. *Nightingale*, 6 Allen, 344. *Hubbell* v. *Warren*, 8 Allen, 178. · *Underwood* v. *Carney*, 1 Cush. 285. 1 Smith Lead. Cas. 27, note. *Hills* v. *Miller*, 3 Paige, 254. *Watertown* v. *Cowen*, 4 Paige, 510. *Hooper* v. *Cummings*, 45 Maine, 364. *Willard* v. *Henry*, 2 N. H. 120. *Sharon Iron Co.* v. *Erie*, 41 Penn. State, 342.

Two other grounds of defence remain to be considered. It is contended that the defendants' grant was upon conditions which the grantees have failed to perform; or at least that the stipulations in regard to sidewalks, paving and repairs, were covenants which have been broken; and so that the plaintiff has no equity to demand the relief he seeks. The answer contains no allegation that the easement was granted on conditions, precedent or subsequent, by failure to perform which the rights described never vested or were subsequently forfeited. Such a defence, if sustained, would of course involve a forfeiture of the entire easement, including the passageway. The whole defence is inconsistent with such a result. The answer proceeds on the ground that the structure erected by the defendants is consistent with the right of passageway which the plaintiff claims, and which it is not distinctly denied that to some extent he possesses; and much of the evidence is directed to sustain the position.

The words "provided that" and "provided also" do not always constitute a condition, and the question whether there be a condition, as well as whether it be precedent or subsequent, is to be determined by ascertaining the intention of the parties from the whole language used, and the nature of the act required. When for the purpose of its fulfilment it implies that the grantee is to have possession and control of the premises, it

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is ordinarily construed to be a condition subsequent. *South Congregational Meeting House in Lowell* v. *Hilton*, 11 Gray, 409. But upon a full consideration of the evidence we do not find it necessary to place the decision upon any alleged insufficiency of the pleadings, or any careful construction of the terms of the alleged condition. The lapse of time, the acts and conduct of the defendants, preclude them from availing in this case of any past breaches of the stipulations in reference to sidewalks, paving and repairs. It is clearly competent to prove a waiver of the strict performance of the stipulations or conditions, by parol evidence of the acts and declarations of the parties. *Leathe* v. *Bullard*, 8 Gray, 545. [Here followed, in the opinion, a summary of the evidence on the question of waiver, which is omitted, as it included no discussion of points of law.] We are satisfied that a literal compliance with the provisions of the grant now insisted on has been waived and dispensed with, to this time at least, by the defendants. *Merrifield* v. *Cobleigh*, 4 Cush. 178. *Hadley* v. *Hadley Manufacturing Co.* 4 Gray, 140. *Ludlow* v. *New York & Harlem Railroad Co.* 12 Barb. 440.

And finally, in regard to the alleged right by prescription to maintain the erection, the evidence fails to satisfy us that such right was acquired by the defendants. [Here followed a similar summary of the evidence on the question of prescription, which is omitted for the same reason.]

All the evidence satisfies us that the present structure is a substantial damage to the plaintiff's estate; and a decree must therefore be entered directing its removal, with a perpetual injunction against its future erection, and with costs for the plaintiff.

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William R. Duff *vs.* James Maguire & others.

Six persons signed an instrument reciting that, desiring to obtain and work a gold mine, they appointed one of their number to go to California and select a mine, which, if his recommendation should be satisfactory, they would contribute equally to buy and work under his superintendence, at a salary to be fixed; and agreeing to contribute a hundred dollars each to pay his expenses to California. He was also orally assured that he should be reimbursed for his expenses over five hundred dollars, which amount his associates paid to him in equal sums; and he took with him to California a letter of instructions signed "for subscribers to agreement" by one of the five, who afterwards wrote a letter to him in the name of the "Company," abandoning the project on the ground that his recommendation was not satisfactory. Both of these letters purported to direct and advise him in behalf of the five, but contained expressions recognizing his association with them as well as his agency. *Held*, that he could not maintain an action at law against his associates jointly, for his services and expenses as agent under the original instrument.

Contract by one of the signers of the following instrument against his five associates in signing the same, to recover compensation for his services as agent, and money expended by him for the purposes of the agency.

"Boston, June 15, 1866. We the undersigned, desirous of obtaining and working a gold property, do appoint Mr. W. R. Duff, our agent, to proceed to California and make such investigations of mines as he may see fit, and report. And, upon his recommendation, if satisfactory to a majority of the subscribers, we and each of us agree to raise the necessary amount of money, proportionately, to put the property in working order. And we further agree to pay the sum of one hundred dollars each to defray said Duff's expenses to California; and further, upon Mr. Duff's report should it be decided to erect machinery upon the property he may recommend, he agrees to leave the question of his salary open, to be decided when he shall have placed the mill and property in working order. And it is further understood, that each subscriber hereto is not bound for a sum to exceed five thousand dollars currency."

At the trial in the superior court, before *Putnam*, J., the plaintiff proved the execution of this instrument by the subscribers; and also put in evidence a letter addressed to and received by

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him on the same day, signed by Maguire "for subscribers to agreement," the material parts of which were as follows:

"As you are about to take your departure for California with a view to prospecting and examining mining properties and reporting to us the result of your investigations relating to the purchase and working thereof, and as you are to be equally interested with ourselves in whatever property we may see fit to accept, it is due to you that you should be made acquainted as much as possible with our feelings and wishes in relation to the objects we have in view in employing you as our agent. It is the desire of all the gentlemen associated with you that you should be successful in finding a valuable property that will cost but little money, and it is expected of you that, before you report, you will visit the mines in various localities, and that you will avail yourself of the aid and opinions of one or more of the most competent and reliable judges of mining property before making the decision upon which you are to base your report. You cannot be too particular and specific in your report to give all the points upon which you base your decision." "You are aware from the repeated conversations you have had with us that in going into an enterprise of the nature specified herewith, our object is to obtain, with the least possible outlay, a large paying property, and that we do not wish to be subjected to any experimental scheme, or even to place our money in certain small paying investments. We are confident that there are abundant opportunities to secure properties that will return us from 50 to 100 per cent. per annum on our money, and it is such as these that it is desirable you should secure." "The matter of your compensation is to be left to be arranged in the future. All it is necessary for us to remark in this connection is that we are disposed to do justly by you and pay you as well as others are paid occupying similar positions, and assure you we cannot believe there will be any difficulties arising upon this point. In corresponding with us you will please address your communications to Mr. Maguire. In conclusion, you are to understand that whatever property we decide to accept, it is with the understanding that you are to act as general superintendent and chief manager."

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The plaintiff further introduced evidence tending to show that on June 15, when he accepted the appointment of agent, and received the letter of instructions signed by Maguire, "there was also placed in his hands the sum of five hundred dollars for his expenses to California, and that he was at the same time told to keep a correct account of his expenditures, and whatever they should exceed said sum should be allowed and paid;" that the five hundred dollars thus placed in his hands was contributed in equal sums by the five defendants; that he went to California and reported from there to the defendants concerning several mines, none of which were acceptable to a majority of the subscribers of the instrument of June 15; and that finally, on receiving notice that the whole project was abandoned, he returned to Boston. He also put in evidence a letter, dated September 20, 1866, addressed to him in California, and signed by Maguire "for Company," alluding to the receipt of letters and a telegram from him dated in August; reciting a telegram addressed to him in reply, thus: "Company decline accepting, operation too extensive, decided to abandon scheme entirely, particulars mail;" and continuing as follows:

"As it was the universal opinion of the subscribers to the document authorizing you to proceed to California and select a mining property, that your selection, though undoubtedly in many respects an excellent one, would involve a much larger eventual outlay than they were prepared or desired to assume, and partook too much of the nature of an experiment," "it was deemed advisable to abandon the scheme entirely. That the course the Company have taken will be some disappointment to you we are well aware, and regret you could not have found a property conforming more closely to the ideas of the Company, as expressed in the document appointing you agent. By steamer of 11th August from New York, went out Mr. W. H. Adams and Mr. John Kennan, both of whom will probably see you and examine the property in question, and should their views coincide fully with yours as to the value of the property, and they should advise the Company here that the purchase would prove a satisfactory one to them, it is quite probable the

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Company might be induced to accept the property, if obtainable on same or perhaps better terms than those enumerated in your letters. We may expect to hear from Messrs. Adams and Kennan in all this month, and your brother, who is now here, will write you to-day, and may explain more satisfactorily to you the feelings of the Company here on this subject. We shall wait on you with further correspondence, if circumstances require."

The judge refused the following ruling requested by the defendants: "That the plaintiff cannot recover of the defendants, in an action at law, for his services as agent, under the contract of June 15, 1866, or for money expended by him as such agent; but his claim for such services and expenditures can be enforced only in a court of equity," and ruled to the contrary. The jury returned a verdict for the plaintiff for $2760.89; with a special finding that they assessed $1800 for his services, and the balance for his expenditures; and the defendants alleged exceptions.

T. M. Hayes, for the defendants.

C. Allen & W. G. Colburn, for the plaintiff, cited Met. Con. 131 note, 132, 309, 310, and cases there cited; *Wiggin* v. *Cummings*, 8 Allen, 353; *Hunt* v. *Rogers*, 7 Allen, 469; *Shattuck* v. *Lawson*, 10 Gray, 407; *Sikes* v. *Work*, 6 Gray, 434; *Dickinson* v. *Williams*, 11 Cush. 260; *Fanning* v. *Chadwick*, 3 Pick. 420; *Dickinson* v. *Granger*, 18 Pick. 315; *Shepard* v. *Richards*, 2 Gray, 424; *Williams* v. *Henshaw*, 11 Pick. 82.

Hoar, J. The court are of opinion that, by the plain import and just construction of the contract signed by the plaintiff and the defendants on June 15, 1866, they associated themselves together as a company, for the purpose of purchasing and managing mining property in California. The plaintiff was appointed agent of the company, to go to California and select the property; which, if his recommendation should be satisfactory to the majority of the associates, was to be purchased and worked under his superintendence, at a salary to be afterward agreed on. He agreed, with the others, that each of the six associates should contribute equally to the capital required a sum not exceeding five thousand dollars for each. It was

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agreed that each should pay one hundred dollars to defray the plaintiff's expenses as agent, and the five defendants paid each one hundred dollars. The plaintiff was assured that whatever his expenses might exceed five hundred dollars should be allowed and paid.

The contract thus created does not seem to us to have been varied by the letter of instructions which he carried with him to California, nor by the other letter addressed to him at a later period. The letter of instructions says, "You are to be equally interested with ourselves;" and speaks of "the desire of all the gentlemen associated with you." Though the letters give directions to him as an agent, they are written in behalf of the company and the subscribers to the agreement, of whom the agent was himself one. The last letter indeed speaks of "the universal opinion of the subscribers," and of "the general feeling," which would apparently refer to the defendants exclusively; but in another passage it speaks of explaining the feelings of "the company here," which implies that his association with them was still recognized.

It is the common case of partners in a common enterprise employing one of their number in a particular part of the business, with a stipulation as to his separate compensation; but the contract with him is the joint contract of all the partners, himself included. The responsibility for the expenses incurred and the services rendered by the plaintiff as agent was therefore one which rested upon the whole company; and although his agency was the only part of the partnership business which was ever actually transacted, the settlement of the accounts is still a matter of equity jurisdiction exclusively. *Myrick* v. *Dame*, 9 Cush. 248.

But the plaintiff contends that the partnership, if one existed, has been dissolved, and that nothing remains to be done to settle the partnership affairs but to ascertain and pay the balance due him; and that under such circumstances an action at law may be maintained.

The answer to this suggestion is, that it does not affirmatively appear that the partnership had incurred no other expenses, and

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that no other accounts remain to be settled. But if this should be made to appear, the difficulty remains that these defendants have no contract with the plaintiff which is obligatory upon them jointly. He made no agreement that the other five should pay him, but that the whole company should do so, including himself among the promisors. The liability of each member to contribute his share to the discharge of a partnership debt, or to reimburse to one what he may have paid beyond his just proportion, is a separate and not a joint liability. Neither of the five defendants is answerable to the plaintiff for the other four. A joint judgment at law cannot therefore be rendered against them upon this cause of action. All the cases cited for the plaintiff are cases in which there were but two partners, or where there was an express promise to one by the other partners jointly; and we are not aware of any case in which the doctrine has been carried farther to sustain an action at law, nor do we see how it could be consistently with settled principles. The plaintiff's remedy is in equity, and the verdict for him cannot be supported. *Exceptions sustained.*

WILLIAM G. WARDEN *vs.* HENRY N. F. MARSHALL.

A., having ready for delivery in a bonded warehouse in a city a certain quantity of oil of a particular kind, made a contract with B. to deliver to B. for an agreed price such a quantity of oil of that kind in such a warehouse in that city during a certain month at buyer's option on ten days' notice within the month. About ten days before the end of the month, B. employed a broker to sell the oil thus contracted for, who sold it to A. for a price less than the price agreed in the original contract. *Held*, that there was no rescission of that contract, although the oil never passed from the actual possession of A.; that the authority given by B. to the broker to sell the oil included the exercise of the option to take it under the contract; and that the resale of it by the broker to A. implied an acceptance of it from A. as B.'s property, which dispensed with the necessity of any formal delivery and redelivery of it. *Held, also*, that A. might maintain an action against B. on a count upon an account annexed in which he charged B. with the price agreed in the original contract, and credited him with the price for which the oil was resold by the broker.

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HOAR, J. This case, when reduced to its substance, amounts to this:

The plaintiff had made a contract with the defendant to sell him two hundred and fifty barrels of oil, of a certain quality, at an agreed price, to be delivered at a bonded warehouse in Philadelphia during the month of November 1866, at buyer's option on ten days' notice within the month. The plaintiff had the requisite quantity of such oil ready for delivery in a bonded warehouse in Philadelphia. The market price of oil having fallen, the defendant, about the 20th of November, employed some brokers to sell the oil for him at a fixed price. The brokers sold it to the plaintiff for that price, no one else being found who was willing to give so much. The oil being already in the plaintiff's possession in the bonded warehouse, no other delivery was necessary to complete the sale.

The plaintiff sues upon an account annexed, to recover the agreed price of the oil under the original contract, giving the defendant credit for the amount for which it was repurchased; and we can see no objection to the maintenance of the action.

The defence seems to rest upon the ground that the original contract was rescinded; that no oil was ever delivered in pursuance of it. On the contrary, we think these facts show that it was completely executed. The oil which was the subject of the contract was designated by the bill of sale, and was in the plaintiff's possession. The authority to the brokers to sell the oil included the exercise of the option to take it under the original contract; and the resale of it to the plaintiff implied an acceptance of it from the plaintiff as the defendant's property.

The plaintiff might have made out one bill of sale from himself to the defendant, and received in return a corresponding bill of sale from the broker at the reduced price. Instead of this, the plaintiff credited the amount due on the sale to him in his bill to the defendant. But this cannot alter the essence of the transaction. No more effectual acceptance of the oil from the plaintiff could be devised than in assuming with his consent the ownership of it, so far as to make a new contract of sale to him. The delivery and redelivery of the oil would have been an idle

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ceremony which the law does not require. There are no rights of third parties involved, and the question is only what would be sufficient to change the title to the property as between the two parties to the contracts. To hold the transaction which the evidence discloses to be a mere rescinding of the original contract would be an entire disregard of the manifest intention of the parties; and would produce a result wholly at variance with it.

The cases from Pennsylvania cited by the counsel for the defendant are all cases arising under a peculiar provision of law, by which equitable estates can be levied on at law for the satisfaction of debts. A vendor, not having conveyed the legal estate in land which he sold, levied upon the equitable interest which had passed to the vendee, in order to obtain payment of the purchase money; and, the levy not producing enough, sued the vendee for the part which remained unpaid. It was held that the original contract was rescinded in the view of equity, because the vendor had acquired the vendee's interest under the contract for a consideration, and cut off the right to a transfer of the legal title. But Chief Justice Gibson observes, in *Purviance* v. *Lemmon*, 16 S. & R. 292: "This suit being brought for the residue of the purchase money, it is said that the reacquirement of the equitable interest by the vendor does not work a dissolution of the contract. At law it certainly does not."

The fact of the difference in price shows that it was not the intention of the plaintiff, nor the expectation of the defendant, that the first contract should be rescinded.

There having been something fully equivalent to a delivery of the oil sold, the count on an account annexed is proper and sufficient. *Stearns* v. *Washburn*, 7 Gray, 189.

Exceptions overruled.

J. D. Ball, for the defendant, cited *Chew* v. *Mather*, 1 Penn. 474; *Purviance* v. *Lemmon*, 16 S. & R. 292; *Day* v. *Lowrie*, 5 Watts, 412; *Healy* v. *Ully*, 1 Cowen, 345; *Folsom* v. *Great Falls Manufacturing Co.* 9 N. H. 355; *Sizemore* v. *Morrow*, 6 Ired. 54; *Morris* v. *Rexford*, 18 N. Y. 552.

E. M. Bigelow, for the plaintiff, was not called upon.

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Edward Whitney & others *vs.* William Esson & others.

A usage of agents, in collecting drafts for absent parties, to surrender them to the drawees at maturity, and, upon mere confidence in the good credit of the drawees, to take in exchange their checks upon banks, is not a reasonable usage.

The buyer of goods sent to the seller the draft of one third person on another for their price, with a request to pass it to the buyer's credit; and the seller, after obtaining the acceptance of the drawee, replied that it should appear to the buyer's credit when paid. At its maturity the seller surrendered it to the drawee, taking in exchange his check upon a bank. The drawee failed before the check could be collected in the ordinary course of business; no notice of dishonor or protest of the draft was ever given to the drawer; and the seller presented the check as a claim against the drawee's estate in insolvency. *Held*, that the seller could not maintain an action against the buyer for the price of the goods.

Contract by the firm of Sprague, Soule & Co., merchants at Boston, for the price, $2235.35, of an invoice of goods sold to the defendants, who were traders in Nova Scotia. Defence, that the defendants had fully paid the plaintiffs for the goods.

At the trial in the superior court, before *Ames*, C. J., these facts appeared: The defendants, on March 14, 1866, sent a letter to the plaintiffs, inclosing a draft of Huse & Lowell, bankers at Halifax, on J. H. Clapp & Co., bankers at Boston, for the price of the invoice, with a request for the plaintiffs to pass it to the defendants' credit. The plaintiffs presented the draft for acceptance, and, upon its acceptance by the drawees, replied on March 17 to the defendants, acknowledging the receipt of it, and adding that it had "been accepted, and will appear to your credit when paid."

The hours of business at banks in Boston were from nine o'clock till two o'clock: and at quarter before two o'clock on the afternoon of Friday, March 30, which was the last day of grace on the draft, one of the plaintiffs called with it at the office of the drawees, where there were other customers at the time, the completion of whose business he was compelled to await until a few minutes past two o'clock, when he gave up the draft to them upon receiving their check on the Third National Bank of Boston for the amount of it. This check the plaintiffs deposited, the next morning, upon their account in the Massachu-

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setts Bank; and on the morning of Monday, April 2, (but precisely at what hour did not appear,) it was returned to the plaintiffs through the Clearing House, unpaid. One of the plaintiffs then presented it at the Third National Bank about the middle of the forenoon, and was answered "No funds." He immediately called upon the drawees, and demanded a surrender of the draft; but they refused to return it. The plaintiffs then telegraphed to the defendants in Nova Scotia: "Clapp failed. Draft was presented when due, and they gave check on bank, which bank declined paying. No funds."

At the close of bank hours on Friday, March 30, there was a balance of $6696 to the credit of the drawees on their account with the Third National Bank; and at the close of bank hours on Saturday, March 31, a balance of $3687.96. This was all paid out on Monday morning, when the drawees stopped payment at ten o'clock, after doing business as usual until that hour; and their failure became publicly known before eleven o'clock. Up to the time of their failure their credit was always good.

The deposition of a member of the defendants' firm was put in evidence, to the effect that no notice of dishonor or protest of the draft was ever received by them; and a similar deposition of a member of the firm of the drawers as to the nonreceipt by them also of any such notice.

"It was agreed that it is a usual and common practice for holders of drafts to accept the check of the drawee in exchange for the draft, though it was not claimed to be a general and established usage; and the same agreement was made as to the practice of merchants and bankers to deposit checks at the banks instead of personally presenting them for payment."

On these facts, the judge directed a verdict for the defendants, and reported the case for the revision of this court.

G. O. Shattuck & J. B. Thayer, for the plaintiffs.

A. A. Ranney, for the defendants.

CHAPMAN, C. J. The defendants inclosed the draft of Huse & Lowell to the plaintiffs, with a request that they would pass it to the defendants' credit. The plaintiffs, in reply, acknowl-

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edge its receipt, and say they will pass it to the defendants' credit when paid. As the defendants made no objection to their retaining it on these terms, they are not bound to pass it to the defendants' credit unless it has been paid, or unless they have so treated it as to have become responsible for it.

On the last day of grace they presented it for payment; and on receiving the check of Clapp & Co. for the amount, payable to their order at the Third National Bank, they gave up the draft to them to be cancelled. No notice of the nonpayment of the draft has been given to Huse & Lowell, and the defendants have thereby lost all claim upon them. The question is raised whether the receipt of this check by the plaintiffs was a payment of the draft. If it was not, the plaintiffs have given up the draft to the drawees without payment, and it has thereby been lost to the defendants unless the plaintiffs are liable for it. If it was paid, the payment has been received by the plaintiffs. It would be unreasonable to hold that it was no payment to the plaintiffs, and yet that they were justified in giving up the draft without payment by the acceptor or taking any steps to hold the drawer.

In *Russell* v. *Hankey*, 6 T. R. 12, it was held that a banker in London, to whom bills of exchange had been sent for collection by his correspondent in the country, was not guilty of negligence towards his correspondent in giving them up on receipt of checks drawn upon a banker in London, though the checks were dishonored for want of funds. The decision was based upon the ordinary usage in London. But in Byles on Bills, (5th Am. ed.) 24, it is said not to be usual at this day with London bankers to exchange bills for checks, and it is doubtful whether they would now be protected in so doing. In this case it is agreed by the parties that it is a common practice for holders of drafts to accept the check of the drawee in exchange for the draft, though it is not claimed to be a general established usage. It is undoubtedly true that men who keep bank accounts are accustomed to give checks for their debts, and in most cases their standing is such that these checks are taken by their neighbors as readily as cash. This may make a common practice among

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men who are dealing on their own account, in respect to such dealings; but such a practice falls short of a usage applying to the collection of drafts for absent parties. And it is not a reasonable usage that one who collects a draft for an absent party should be allowed to give it up to the drawee, and sacrifice the claim which the owner may have on prior parties, upon the mere receipt of a check which may turn out to be worthless.

By taking the check and giving up the draft, the plaintiffs made the check their own as between them and the defendants, and were bound to apply it to the payment of the debt now in suit, in conformity with their agreement.

Judgment for the defendants on the verdict.

ALFRED RICHARDS & others *vs.* ALBERT STEPHENSON & trustee.

A party summoned as trustee in a process of foreign attachment filed an answer generally denying liability as such, and to interrogatories of the plaintiff replied that at the time of receiving service of the writ he did have in his possession a promissory note due that day and payable to the defendant's order, which he received from a correspondent with directions to collect and pass the proceeds to such correspondent's credit; with which directions he complied; that he never had any communication with the defendant, nor was ever informed by any one in his behalf that such proceeds belonged to him; and that he had advised his correspondent of the service of the writ, who replied that he would take care of it and asked him to hand the summons to an attorney-at-law. *Held*, that he was not chargeable as trustee, although it did not appear that the note was ever indorsed by the defendant.

TRUSTEE PROCESS. The Suffolk National Bank, of Boston, summoned as trustee, filed an answer denying that there were intrusted or deposited in its hands or possession any goods, effects or credits of the defendant, on June 25, 1867, when it received service of the writ; and replied substantially as follows to interrogatories of the plaintiff: That it did have in its possession a promissory note for $556.67, signed by Richards, Adams & Co., and payable on that day, with interest, to the order of the defendant, the amount of which, with interest, it that day collected, and passed the proceeds to the credit of the Second National Bank of Portland on its open account with the

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Suffolk Bank, in accordance with the directions contained in a letter from the cashier of the bank in Portland, in which he had forwarded the note for collection; that neither the defendant nor any one in his behalf ever gave it notice that such proceeds belonged to him; that it never had any communication with the defendant; and that it gave notice to the bank in Portland of the service of the writ, and the cashier replied that "they would take care of it," and requested that the summons might be handed to a firm of attorneys-at-law in Boston. It did not appear by the answer that the note in question bore any indorsement whatsoever.

No other evidence was offered on the question of charging the trustee; the superior court ordered its discharge; and the plaintiffs appealed.

S. Wells, Jr., for the plaintiffs, cited *Allen* v. *Ayres*, 3 Pick. 298; *Parham* v. *Murphee*, 16 Martin, 355; *Carvick* v. *Vickery*, 2 Doug. 653.

T. F. Nutter, for the trustee.

Foster, J. A party summoned as trustee is to be discharged, unless it affirmatively appears by his answers, aided by the collateral proofs, that he is chargeable. *Porter* v. *Stevens*, 9 Cush. 530. The exception to this rule is, when the answer admits enough to make the trustee *primâ facie* chargeable, and then states some special matter in avoidance. *Lane* v. *Felt*, 7 Gray, 491. A trustee cannot be held liable, when he does not appear ever to have been the debtor of the defendant.

In the present case, it is clear that extrinsic evidence might have been offered by either party to show whether the note, when paid to the Suffolk Bank, was owned by the defendant or by the bank in Portland which sent it to Boston for collection. Gen. Sts. *c.* 142, § 11. So also the Portland bank might have been summoned as claimant. § 15. In this way the real question in controversy would have been tried more fully, and determined more satisfactorily, than it can be upon the trustee's answers alone. But it was quite as much the duty of the plaintiff as of the trustee to take active measures to bring the Portland bank before the court as a claimant.

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We are of opinion that the single fact, that the note does not appear to have been indorsed by the defendant, who was the original payee, is insufficient to overcome the effect of the trustee's general denial of liability, together with the statements that the note was transmitted for collection by the bank in Portland with directions to credit it, when paid, to the account of that bank, and that the defendant has never claimed the proceeds or had any communication with the Suffolk Bank in regard to the note.

The judgment of the superior court is affirmed, and the

Trustee discharged.

AMERICAN BANK *vs.* ELBRIDGE F. ROLLINS & trustee.

A party summoned as trustee in a process of foreign attachment in this Commonwealth is not chargeable on account of his possession, at the time he receives service of the writ, of funds for which an action by the principal defendant is then pending against him in another state, in which he has entered his appearance.

TRUSTEE PROCESS. Elbridge F. Rollins, the principal defendant, was defaulted. The Equitable Safety Insurance Company, summoned as trustee, disclosed, in answers to the plaintiff's interrogatories, that in 1860 it made a policy of marine insurance upon the interest of Rollins in the ship Forest Oak, upon which policy a loss was claimed and an action brought by Rollins in the state of Maine, in which the insurers appeared by attorney and which was removed to the circuit court of the United States for the district of Maine, where it was pending on August 24, 1865, when the writ in this action was served on the company; and that on April 30, 1867, Rollins recovered judgment against the company for upwards of $4500, and prior to October 1867 commenced an action on that judgment in the circuit court of the United States for the district of Massachusetts.

Nathan W. Bridge and others appeared as claimants of the credits of Rollins thus disclosed; the superior court ruled that the company was chargeable as trustee, from which ruling the

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company and the claimants appealed; and on the trial of the issue between the plaintiff and the claimants a verdict was returned in favor of the latter and the plaintiff alleged exceptions which now are immaterial.

J. C. Dodge, for the trustee.

R. D. Smith, for the claimants.

S. Wells, Jr., for the plaintiff.

Foster, J. This cause depends upon the principles determined in *Whipple* v. *Robbins*, 97 Mass. 107. The insurance company was summoned as trustee in the present action in August 1865; and an action was then pending against the company, in favor of the present defendant, in the state of Maine. The pendency of this prior suit is relied upon by the corporation as a reason why it should not be charged as trustee in this Commonwealth.

A trustee process pending in one state has been held a good defence to a subsequent action brought in another jurisdiction by the defendant in the first suit against his debtor, the trustee. This is *Embree* v. *Hanna*, 5 Johns. 100. A subsequent trustee process in one state is not pleadable *puis darrein continuance* to defeat an action previously commenced against the trustee by his creditor in another state. *Wallace* v. *McConnell*, 13 Pet. 136. Payment by one charged as trustee on a judgment recovered in one state, when an action was previously pending in another in favor of the defendant in the trustee process against the trustee, cannot be made available as a defence to the action first instituted. This is *Whipple* v. *Robbins*.

These adjudications are different applications of the same principle. A trustee process is in the nature of a proceeding *in rem*. It is a sequestration of the debt due from the trustee, in order that it may be devoted to the payment of one to whom the trustee's creditor is himself indebted. After its commencement, the trustee is not subject to an action by his creditor. The only exception is, where both suits are within the same jurisdiction and under a system of procedure which regulates both, so as to afford the trustee complete protection against a double liability. If the trustee process is prior in time, it is a

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defence to a subsequent action against the trustee in another state. The doctrine constitutes an important exception to the ordinary rule that *lis pendens* in a foreign court is not a good plea. It is essential to justice, and to the protection of the party summoned as trustee, who might otherwise be harassed and imperilled without any fault of his own.

The trustee process in our own courts must therefore yield to the prior action in Maine, and the trustee is discharged. This result disposes also of the controversy between the plaintiff and the claimants of the funds in the hands of the supposed trustee; and the plaintiff's exceptions upon that issue need not be examined, but are immaterial and for that reason must be overruled.

GEORGE W. GERRISH *vs.* GEORGE N. BLACK, executor.

In a suit in equity to redeem land from a mortgage, if in his answer the mortgagee includes the mortgage debt and interest in an account of the amount which he claims as due on the mortgage, the mortgagor has a right, under the eighteenth rule in equity, to amend his bill so as to allege usury in the original contract.

HOAR, J. The court are of opinion that the plaintiff in this suit in equity was entitled to file the amendment which he offered to his bill, as a matter of right, under the eighteenth rule in equity.

He made the motion to amend upon the coming in of the answer, and his motion was disallowed. He had the right to appeal from this ruling within thirty days, and that would have been the regular and proper course. But within the thirty days he renewed his motion, and the question whether he had a right to make the amendment was reserved by the justice before whom the motion was made, for the consideration of the whole court. We do not understand that the question reserved was whether a motion once overruled can be repeated; but that the question, whether the plaintiff had a right to his amendment when he first offered it, was reserved by the judge, instead of leaving him to his remedy by appeal.

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The eighteenth rule in equity provides that "upon the coming in of the defendant's answer, if the complainant shall find it necessary to amend his bill in order to meet the case made by the defendant's answer, he may do so," &c. The plaintiff in this suit brings a bill in equity to redeem a mortgage, offering to pay whatever may be found due upon it. The answer of the defendant admits the right to redeem if the plaintiff is seised of the equity of redemption, and claims an amount as due upon the mortgage according to an account which he states, including the mortgage debt and interest thereon. It also admits that he has taken possession of the mortgaged premises, and holds them for the purpose of foreclosure.

The amendment of the bill, which the plaintiff thereupon proposes, consists in an allegation of usury in the contract for which the mortgage was given, and which was not alleged originally in the bill.

Whether this allegation should have formed a part of the case first stated in the bill, or is strictly for the first time made necessary to meet the case made by the answer, depends upon the construction to be given to our statutes relating to usury, and to the redemption of mortgages; and is, we think, determined by the principles stated in *Hart* v. *Goldsmith*, 1 Allen, 145, and affirmed in *Smith* v. *Robinson*, 10 Allen, 130.

No penalty was incurred upon a usurious contract under the statute, except in two cases. When usury had been actually paid, threefold the amount could be recovered back in an action or bill in equity brought for that purpose within the time limited by law. If usury had not been paid, and a party sought to enforce the usurious contract, the usury could be set up as a defence, and the amount of the penalty deducted from the sum due upon the contract. In *Hart* v. *Goldsmith* it was held that the fact of usury was available in the same manner and to the same extent in favor of a plaintiff in a bill in equity to redeem a mortgage, as by a defendant in an action upon the note which the mortgage was given to secure. The doctrine was briefly restated in *Smith* v. *Robinson* in these words: "That in a suit in equity to redeem a mortgage, if the defendant by his answer

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claims the performance of the usurious contract, he is to be considered an actor within the meaning of the statute, and the mortgagor is entitled to the benefit of the forfeiture for usury in reduction of the sum payable upon the mortgage, exactly as he would have been if the defendant had brought an action to foreclose."

When the defendant to this bill set up in his answer the usurious contract, that is, when he asserted his right to a payment under it as a condition precedent to the plaintiff's right to redeem, he became an actor, asserting and attempting to enforce the contract tainted with usury, and the plaintiff for the first time was called upon to allege the usury, strictly "to meet the case made by the defendant in his answer." He had therefore the right to his amendment within the terms of the eighteenth rule in equity. *Amendment allowed.*

B. J. Gerrish, for the plaintiff.

R. D. Smith, for the defendant.

Charlotte C. Cluff *vs.* Mutual Benefit Life Insurance Company.

On the trial of an action upon a policy of insurance made payable to the plaintiff after due notice and proof of the death of the insured, the plaintiff, to show such notice and proof, called a witness who testified that he delivered to the insurers some affidavits, together with some cuttings from newspapers and letters between persons not parties to the action. All of these the insurers produced; and the plaintiff put the affidavits in evidence, but declined to put in evidence the cuttings or the letters, and the judge refused to require him to do so, or to permit the insurers to do so themselves. *Held*, that the refusal was not a valid ground of exception, unless it plainly appeared that the insurers were prejudiced thereby; and that they were not so prejudiced, if the fact of the death of the insured was sufficiently shown, whether the affidavits alone, or all the papers together, were considered as the proof thereof furnished to them by the plaintiff.

On the trial of an action on a policy of insurance upon the life of the insured, made on condition that it should be void if he should die in the known violation of any law, the record of the trial and acquittal by a court of competent jurisdiction of a person who killed the insured is incompetent to prove that the condition was broken.

In a policy of insurance, the fact that it was made by a mutual company with one of its members upon his life gives to words used for a definite purpose and applied to transactions of a clearly defined character, such as a provision that the policy shall be void if

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the insured shall die in the known violation of any law, no significance different from what would be their fair construction in a similar contract between any parties.

On the trial of an action on a policy of insurance upon the life of the insured, made on condition that it should be void if he should die in the known violation of any law, evidence was introduced tending to show that he was killed while doing what would constitute either robbery or larceny unless he acted under a belief which would avoid the otherwise criminal character of his acts. *Held*, that instructions to the jury were erroneous which permitted them to understand that such a belief need not be a belief in his legal right to do the acts, but might be a belief in a right of self-redress by reason of the disturbed condition of the country, the inefficient administration of the laws, or otherwise. *Held, also*, on a new trial upon the same evidence, that the fact that the judge did not comply with a request to instruct the jury that the insured must be presumed to have known the civil law of the state where he was killed was not a valid ground of exception, if he did instruct them that the insured had no right to do the acts in the commission of which he was killed, and that he must be presumed to have known the criminal law of the state.

CONTRACT on a policy of insurance made by a mutual insurance company to the plaintiff's husband, Matthew J. Cluff, on his life, in the sum of $3000, payable to the plaintiff "within ninety days after due notice and proof of the death of the said Matthew," and containing a clause declaring the policy void in event that said Matthew "shall die" "in the known violation of any law of these states or of the United States," "or of any other country which he may be permitted under this policy to visit or reside in."

At the third trial in the superior court, before *Putnam*, J., after the decisions reported 13 Allen, 308–319, the plaintiff, to show notice and proof of the death of her husband to the defendants, called Thomas J. Alexander as a witness, who testified that he delivered to the defendants' agent affidavits of the plaintiff and himself and Francis Bugbee; which affidavits, being produced by the defendants on notice, were put in evidence, and in substance were as follows:

The affidavit of the plaintiff stated the age of her husband, and where he resided in 1854, when the policy was made; the places of his subsequent residence until 1859; and that in 1859 he removed to Massachusetts and resided here until on December 23, 1863, he started to go to New Orleans. The affidavit of Alexander set forth that he was well acquainted with Matthew J. Cluff, who lived at Waltham, and whom he knew to be the person on whose life the policy in question was issued; that said

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Cluff left Boston on or about December 23, 1863, to take passage in the steamer Morning Star for New Orleans; that he saw Cluff in New York on December 26, when Cluff showed him his ticket for the passage, and said that he would leave by that steamer on the afternoon of that day; that he afterwards learned that Cluff did so sail; and that he entertained no doubt of his being the person named Cluff described in Bugbee's affidavit. The affidavit of Bugbee stated that he was a physician residing in the parish of Ascension in Louisiana; that he sailed from New York for New Orleans on December 26, 1863, on the steamer Morning Star, with Matthew J. Cluff as a fellow-passenger, and knew said Cluff well from said December to the time of his death, and had "been residing with him on the same plantation for some months up to the time of his death;" that on February 25, 1864, he and Cluff were together upon the bank of the Mississippi River, when Cluff was shot through the heart by William P. Cox, and died in a few minutes; that no coroner's inquest was held, the country being under military rule, but that he procured the attendance of the military officer of highest rank on duty in the neighborhood, (naming the officer,) who examined the body and delivered to him the effects thereon; that he took charge of the burial of the remains, and placed them in a tomb in New Orleans; and that the deceased, according to his own statements and those of others, was from Massachusetts.

Alexander further testified that, at the same time with these affidavits, he delivered to the defendants' agent two slips cut from newspapers published in New Orleans, and two letters written from New Orleans by one George W. Wilder and addressed here to a person (other than the plaintiff) who held a policy of insurance from the defendants on Cluff's life. The defendants produced these cuttings and letters, and requested the judge to require the plaintiff to read them to the jury; but the judge declined to do so. The defendants then offered, themselves, to read them to the jury, "on the ground that the same were part of the preliminary proof, and showed that no cause arose under the policy, and that the assured died in the known violation of law;" and they renewed this offer on opening their defence;

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but the judge both times refused to allow them to be read. These cuttings and letters were produced at the argument in this court, and their substance, so far as it is material, is stated in the opinion.

Besides the evidence of notice and proof to the defendants, the plaintiff introduced the depositions of Bugbee, and of William Scott, a civil engineer, of the parish of St. Charles in Louisiana; and rested her case. The material parts of these depositions were as follows:

Bugbee, after testifying on direct examination to the fact of Cluff's death, testified, on cross-examination, that on February 25, 1864, at the Doyle plantation in the parish of Ascension, he and Cluff "were sitting on our horses on the levee, when William Cox, a boy" "from sixteen to eighteen years of age," "drove along with a load of water. Cluff asked me who that boy was. I told him that it was a Cox boy. He asked the boy when they were going to leave the place. The boy answered, 'they were going soon.' Cluff asked the boy when they were going to pay the bill. The boy answered 'they were not going to pay it all.' Cluff said, 'I will take your horse then.' The boy dared him to do it, and to try it then. Cluff then went unhitching the horse from the wagon. After having partly unhitched, he tried to get the reins or ropes from the boy. The boy then got down from the wagon, by the side of Cluff. Cluff then took a small penknife to cut the ropes. The boy said, 'Don't do that.' Cluff then got the ropes. The boy then ran about three rods, drew a pistol, fired at Cluff, and shot him in the right side between the fifth and sixth ribs. The boy then cocked his pistol again, but did not fire. Cluff said to me, 'He has hit me, doctor,' and never spoke afterwards, and died immediately." "Cluff was in the act of taking the horses from the wagon in which the boy who killed him was." "Cluff did not assault said boy otherwise than by unhitching his horses. He did not beat him, nor did he threaten him just before he was shot, only to the taking of his horses." "The bill Cluff talked of was a bill for feed for the horses and cattle of the Coxes, used by them from the plantation of which said Cluff was the lessee."

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Scott, on direct examination, testified to the fact of Cluff's death; that he was present at the time; that when Bugbee told Cluff that Cox was the driver of the wagon, Cluff told Cox "to halt with his wagon," and that this was what ensued: "When Cox halted his wagon, Cluff asked him when he was going to move. Cox said he had moved some of their things; and then Cluff asked him when he was going to finish moving. Cox said 'he did not know; when he got ready.' Then Cluff asked him 'where he was moving to.' Cox said, 'to Baton Rouge.' Cluff then asked Cox 'when he was going to pay the bill that he sent in to him.' Cox said 'he was not going to pay it all.' Cluff then said, 'You are not going to pay it at all?' Cox said, 'No, sir, I am not.' Cluff then said, 'You have got some stock, hain't you, some horses and cattle?' Cox said, 'Yes.' Cluff then said, 'Well, if you won't pay the bill, I will take your horses and cattle to pay it.' Cox then said, 'You better get at it now.' Cluff got off the levee, and went down on the road where Cox was, and unhitched both horses out of Cox's wagon, and then went up to the wagon and told Cox to turn loose the lines. Cox said he would not do it. Then Cluff pulled out a little penknife, about three inches long, and started to cut the lines of the wagon; and Cox then told Cluff not to cut his lines. Cluff then shut the knife up and put it in his vest pocket, and went up to the horses' heads, and started to untie the lines from the bridle. By that time, Cox left the wagon and went up to the horses' heads where Cluff was, and then grabbed Cluff by the throat. Cluff then struck Cox, and knocked him off from him, making Cox a sort of staggering on his all fours. Then Cox ran off about three strides behind the wagon, and drew out his pistol and fired at Cluff. Cluff then dodged round the horses' heads to keep himself from getting the second fire. Cox tried to get the second fire at him, until he heard Cluff halloo out to the doctor, saying he was struck. At this time Cox whirled and ran. Cluff then fell. The doctor ran to him, and found him dying." And on cross-examination Scott testified that Cluff was about forty years old; that he did not threaten Cox; nor was his conduct and language violent and threatening to-

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wards Cox; nor, when he was shot, was he facing or approaching Cox.

To both Bugbee and Scott the defendants addressed cross-interrogatories, to which the plaintiff objected, as to whether Cox was not tried for the homicide, and whether they did not testify at the trial, and what was the result of it; and the judge sustained the objection and excluded those portions of the depositions. He also excluded the record of the military court by which Cox was tried and acquitted; which record the plaintiff offered "to show the fact of said trial and acquittal, and the law of the place of trial."

The defendants cited the Rev. Sts. of Louisiana, page 160, Criminal Proceedings, § 1, which provide that "all crimes, offences and misdemeanors shall be taken, intended and construed according to and in conformity with the common law of England;" and asked the judge to rule that Cluff "died in a known violation of the law according to the terms of the policy," and to direct a verdict for the defendants; but he refused to do so.

The defendants then requested the judge to instruct the jury "that a claim made by Cluff of indebtedness of Cox for feed, and that he would take his horses for it, was not such a claim, however honestly made, as would change the nature of the forcible taking of the horses of Cox, so that such taking would not be robbery or a known violation of law;" and "that a wrongful taking of the horses of Cox by Cluff by force was a trespass with force, and a criminal offence, and was continued as long as the taking of the horses continued." "The judge declined so to rule; but, among other things, instructed the jury that, to avoid the policy on the ground that the insured died in known violation of law, it must be shown that the insured died in consequence of a voluntary criminal act committed by him, and known by him at the time to be such, and not in consequence of a mere trespass upon property; and that there was a legal presumption that he knew the law. He then defined the offences of robbery, larceny, and assault and battery, (to which no exception was taken,) and further instructed the jury that the taking of the horses from Cox, if done under an honest claim of

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right, however ill-founded, would not constitute the crime of robbery or larceny; that there must be a felonious intent in the crimes of robbery and larceny; that if Cluff took the property with an honest belief that he had a claim of right, it was not larceny, nor was it robbery, though done with force and violence; that if Cluff committed an assault on Cox, and was shot while the assault continued, the plaintiff could not recover; but if that assault had entirely ceased, and, after it had ceased, Cox, through revenge, or to prevent the seizure of the horses, shot Cluff, and this was a new and independent event, and not a continuance of the original affray, then the condition of the policy was not avoided. But, in determining this question, the jury were to consider how far, if he did commit the assault, he could be considered as having desisted from it, while persisting in the act which occasioned the affray; that if Cluff in the first instance committed the assault, and the firing of the pistol was a part of the same continuous transaction, then the condition of the policy was violated. They were also to be satisfied that the death was caused by the criminal act, or resulted from it, so that, if the criminal act had not been committed, the death would not have taken place."

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions, which were argued in November 1867.

A. C. Bradley (of New York) *& C. W. Loring*, for the defendants.

H. C. Hutchins & A. S. Wheeler, for the plaintiff.

WELLS, J. One question in issue at the trial was, whether the plaintiff had, ninety days prior to the institution of the suit, furnished to the defendants sufficient proof of the death of Matthew J. Cluff, whose life was insured, as required by the terms of the policy. To maintain that issue on her part, the plaintiff put in certain affidavits by which that proof had been made, and which were produced in court by the defendants upon notice. The defendants also produced certain extracts from newspapers, and letters between persons not parties to this suit, which had been handed to the officers of the company at the same time with the affidavits, and constituted, as was contended, a part of

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the evidence furnished by the plaintiff to satisfy them of the death of Cluff. These accompanying papers the defendants' counsel claimed to have read to the jury, as a part of the preliminary proofs.

It certainly cannot be maintained that these papers would have been competent evidence upon the main issue; and that position has not been insisted upon. But if they formed a part of the preliminary proofs, and were furnished to the defendant as such, the plaintiff had no right to prove this branch of her case by using a part only of the means by which she had sought to make out that preliminary proof. It does not appear upon what ground the judge who presided at the trial excluded these papers. Perhaps we might reasonably infer that he did so upon evidence from which he was satisfied that in fact they formed no part of what was intended and received as preliminary proof of the death. But the defendants' claim was otherwise; and the evidence reported indicates that they were furnished to aid or corroborate the other proofs. It would seem, therefore, that the exclusion was on the ground that the papers were not competent evidence upon the main issue; overlooking the issue which was raised by the denial of the alleged preliminary proof of death. But, however that may be, we are satisfied that the exclusion of the papers could not occasion any such injury to the defendants as to require that the exception for that cause should prevail. The papers were clearly inadmissible upon the principal issue. Upon the question as to the sufficiency of the preliminary proof, there can be no doubt that the fact of death was sufficiently shown, whether the affidavits alone or all the papers together are to be regarded as constituting that proof. The contract requires "due notice and proof of the death." It does not require the facts and circumstances attending the death to be set forth in the proofs. In this respect, as well as in the fact that the statements are not sworn to and do not even purport to be made by the plaintiff herself, the case differs essentially from that of *Campbell* v. *Charter Oak Insurance Co.* 10 Allen, 213. When an apparent ground of defence is disclosed by a separate and unnecessary narration of circum-

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stances, and the proofs required by the policy are complete without that narration and disclosure, it cannot be said that the party has failed to comply with the condition imposed upon his right to litigate his claim; and the effect of such disclosure to defeat the action must depend upon the degree to which the plaintiff is bound by the statement. If not sworn to by the plaintiff, nor treated by him in such manner that he is concluded by his conduct, the whole question will be open to explanation and proof upon the main issue, subject to the usual rules of evidence. We cannot see that the plaintiff was in any respect concluded, or the defendants misled, by the account of the transactions connected with Cluff's death which were contained in the papers that were excluded at the trial; nor that the defendants have been deprived of any benefit which could have been properly derived from their admission.

The answers to cross-interrogatories relative to the trial of Cox were properly excluded, and that exception is not urged here.

The record of the provost court, showing the acquittal of Cox, was not competent for this defence. There is no privity of parties, nor identity of issues. The acquittal of Cox could not establish the fact that Cluff was guilty of a crime; but only that the offence of Cox was excused by the circumstances of provocation. Cluff's conduct was incidentally involved. It was not the subject of the judgment that was rendered. The law applicable to the conduct of Cluff, as it would affect him, could not be judicially determined in the trial of Cox.

The remaining exceptions relate to the proper application of the law, as determined at the former hearing in this case, to the testimony showing the circumstances of Cluff's death. In this connection we are asked to revise that decision, in consideration of the fact that this policy is a contract between a mutual company and one of its members. But we cannot think that that circumstance should modify the construction which has been given to the terms of this contract. The relations of the parties are always to be considered in seeking the true interpretation of their language. But their words, used for a definite

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purpose and applied to a transaction of a well understood character, must be held to convey the meaning and force which is ordinarily attached to them. We see no reason to give the words of this contract any significance different from what would be their fair construction between any parties.

Among the points already decided are: 1st. That "violation of law," as used in this policy, means crime; and "known violation of law" indicates a voluntary criminal act. 2d. That offences against the person or property of another, such as are recognized and treated as crimes by the common law, and the laws of civilized countries generally, will be presumed to be crimes in Louisiana. 3d. That the burden of proving that the insured died in the known violation of law is upon the defendants. 4th. That Cluff must be presumed to know the criminal laws of the government under the jurisdiction of which he was.

The testimony in regard to the circumstances under which Cluff met his death tended to show that he was engaged in the commission of acts which would constitute either robbery or larceny, unless he acted under a belief that he had some legal right by which his conduct would be justified. Whether the two depositions, from which the whole testimony upon the subject was derived, furnished evidence that he acted under such a belief, seems to have been a point of contest. There was no evidence of any title or claim of title; nor any direct evidence of the existence of a right of lien. The depositions show that Cluff made the claim of a debt due him from the owner of the horses; and that he declared his purpose to take the horses to pay it. Neither deposition states that Cluff, in words, set up any right of lien, or other legal right to hold or to take the property of Cox. But the deposition of Bugbee indicates, inferentially, that Cluff might have supposed that the horses could legally be held as security for his debt, inasmuch as it was claimed to have arisen from the keeping or feed of the stock upon the plantation of which Cluff was lessee.

The instructions upon this point were undoubtedly intended to correspond with the opinion given by this court upon the

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exceptions taken at the last previous trial. They do so to the extent of adopting in part the language of the opinion, to wit, that the "taking of the horses from Cox, if done under an honest claim of right, however ill-founded, would not constitute the crime of robbery or larceny." But, in the opinion, that proposition is followed, in the next clause of the same sentence, by the explanation which limits the "claim of right" intended to one whereby the party sincerely "believes that he is legally justified in taking property;" whereas the instructions contain no qualification nor suggestion limiting it to the claim of a legal right. This might not be important, if we were able to see, or could properly assume, that these instructions were applied only to that suggestion of a claim of right by way of lien which is founded upon the deposition of Bugbee, namely, the right to hold the stock as security for what was due Cluff from the owner, on account of his previous occupation of the plantation of which Cluff had a lease. Such a claim would be of a legal right, if the jury should find that it was in fact made. But the evidence that Cluff claimed or that he believed he had such a right was very slight. The defendant's counsel contended that the evidence showed no claim to have been made by Cluff, except of a debt against the owner of the horses; and that he avowed his purpose to seize the horses by way of self-redress. In this view of the evidence, he asked for the following instruction, namely, "That a claim made by Cluff of indebtedness of Cox for feed, and that he would take his horses for it, was not such a claim, however honestly made, as would change the nature of the forcible taking of the horses of Cox, so that such taking would not be robbery or a known violation of law." This position of fact was so far warranted by the state of the evidence as to entitle the party to instructions, not perhaps in the form as requested, but such as would be adapted to the case if the jury should find the facts to be as the defendants assumed. Applying the instruction given, as reported, to this view of the facts, it seems clear that too great latitude was allowed for the jury to take into account any loose opinions of right which they might suppose Cluff to have formed. It would seem to permit

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a mere opinion or theory of abstract right, which the jury might think Cluff had come to entertain honestly, and chose to act upon regardless of positive law, to exempt him from criminal responsibility. A claim of right which can have this effect must be a claim of legal right. It is not enough that it be asserted. There must be a real and not a pretended belief that such legal right exists. It involves more than a belief in the right to disregard law for the purpose of self-redress.

We are not informed upon what theory the counsel of the plaintiff would contend that Cluff acted under an honest claim of right, assuming the facts to be as the defendants present them; nor does it appear that the plaintiff insisted, at the trial, that there would be any pretence of legal justification upon that assumption. But the instructions do not point to any particular claim of right. They are applicable to the defendants' view of the evidence as well as to that of the plaintiff. They should therefore leave no doubt in the minds of the jurors that nothing less than a claim of a legal right, or an authority of law, was intended; especially if the attention of the court was called to the defendants' view of the evidence, in connection with this instruction. A majority of the court are of opinion that it appears from the exceptions that the attention of the presiding judge was so directed; and that the instructions given were not sufficiently explicit and qualified in the respects already considered.

The plaintiff insists, however, that this whole subject was brought under discussion by the exceptions taken at the last previous trial, and fully and conclusively determined by the decision then made, so that no question is now open upon this part of the case. We have indicated the points in which the instructions given at the last trial fail to conform to the real purport of the opinion by which the former decision was announced. It may be observed also, that the instructions which were then brought up for our revision differ from the present, in that the claim of right which was then held to disprove felonious intent was confined to the case of a "belief that he had a legal right" to take the property. As thus qualified, and applied to the case

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then presented upon the exceptions, this court did affirm the instruction. It is true that the defendants' counsel did discuss, at that time, some of the points now considered. But the plaintiff's counsel contended, as appears from the brief submitted by them, that no such question was open upon the exceptions, inasmuch as the defendants' prayers in relation thereto all involved conclusions of fact; and the court were inclined to the same view.

The burden is upon the defendants, as has been already decided, to satisfy the jury that the act of Cluff which occasioned his death was a voluntary criminal act. This requires the defendants to overcome any inference, which may be drawn from the testimony, that in attempting to take the horses he acted under an honest belief that he had some legal right or authority which entitled him to take them. But if the defendants should be able to satisfy the jury that Cluff had no color of title or right in or to the property, nor of legal authority to take it; and that he made no claim of any such title or right, nor of any authority, except that, having a debt against the owner of the horses, he claimed a right to seize his property in payment, by way of self-redress without regard to law, we think the defendants would then be entitled to a verdict. Such a claim would be a claim of the privilege to commit a crime, which the law will not recognize to be honestly made as a claim of right.

We regret that it should be necessary to submit the case for a third time to a jury; but it is of more importance that exact justice should be administered than that the litigation should be closed at any particular stage. As the case was left by the last trial, it would appear that the verdict may have been rendered for the plaintiff, although the jury were satisfied that Cluff had no pretence of any title, lien or other right, nor of any legal authority, merely because they supposed that he might have entertained an honest belief or opinion that in consequence of the state of the country and the want of efficient administration of the laws, he had a good right, from necessity or otherwise, to take redress into his own hands without regard to law. Such is not the result of our decision upon the former occasion, and such

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was not, as we understood the case, the fair interpretation of the instructions then brought up for our decision.

In accordance with these views it will be necessary that a new trial should be had. *Exceptions sustained.*

At the fourth trial, before *Ames*, C. J., no question was made as to the notice and preliminary proof of the death of the insured; and the evidence produced by the plaintiff in support of her claim was the same as was offered at the former trials, with some additional citations from the laws of Louisiana.

The defendants requested the judge to adopt, in instructing the jury, the following propositions: "That by the laws of Louisiana, as well as by the common law, Cluff had no right of lien or privilege on or to the horses, or either of them, in the possession of Cox, even if it had been shown that the horses, or either of them, had eaten feed belonging to Cluff; that every person must be presumed to know the civil equally as the criminal law of the government under the jurisdiction of which he is found; that Cluff must be presumed to have known that he was not legally justified by the laws of Louisiana in taking the property in question, unless there be evidence that he did in point of fact believe that the actual laws of Louisiana authorized him to do what and as he did in the seizure; that the threat to seize Cox's horses for the debt, whether real or pretended, was, unless a seizure by due process of law was thereby intended, a threat to do an act illegal by the laws of Louisiana; that a threat to do an act illegal by the laws of Louisiana is not of itself evidence on which a jury may infer that the person making such threat believed the act in point of fact legal by those laws; that the seizure of the horses in the manner described was illegal by those laws, and the fact of doing an act illegal by those laws is not in itself evidence from which a jury may infer that the party doing it in fact believed the seizure actually legal under those laws; that it is not enough that the jury supposed that Cluff might possibly have thought that he had a right to seize the horses in the way he did, but the jury must themselves believe as a real fact that Cluff believed as a real fact that he had a

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right by the actual law of Louisiana to seize the property as he then and there seized it; that Cluff having in fact no right under the laws of Louisiana to seize the property in the way he did, the belief that he had such right is an affirmative fact to be proved by the plaintiff, and, in the absence of such proof, he must be deemed not to have believed it; and that the jury, in the absence of any law giving a lien or privilege for feed, are not warranted in finding, if the plaintiff's evidence is merely to the extent that the owner of the horses owed a bill for feed to Cluff, that Cluff believed he had a legal right to take the horses for it."

The judge did not adopt the instructions thus requested; but did instruct the jury substantially "that, the execution of the policy, the notice and preliminary proofs, and the fact of Cluff's death in Louisiana being admitted, the only question was, whether the circumstances of his death were such as within the terms of the proviso in the policy to exonerate the defendants from paying the amount of the policy; that the burden of proof was on the defendants to show that Cluff died in the known violation of the laws of Louisiana, that is, in doing some voluntary criminal act; that offences against the person or property of another, recognized and treated as crimes by the common law, and the laws of civilized countries generally, are to be presumed to be crimes by the laws of Louisiana; and that Cluff must be presumed to have known the criminal law of that state; that the question then would be, whether he was engaged in doing a criminal act at the time; that it was conceded that he was trying to get possession of the horses without the consent and against the will of the person having them in charge; that what he was trying to do might be robbery, or larceny, or an act which might not have proceeded from a criminal intent; that to make it out robbery or larceny, (and it was immaterial which, if it was either,) it must appear that he was taking the property, with a felonious intent, without the consent and against the will of the person having it in charge; that it was clear on the facts that he had no right to take it, and the mere fact that he was a creditor would not give him a right to help himself to the prop-

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erty of his debtor; that there was no evidence that by the laws of Louisiana he had any lien on the property; but that the defendants were bound to prove that it was not only a wrongful, but also a criminal act; and that if Cluff had not lost his life in the attempt, and had accomplished his object, and had been indicted for robbery or larceny, he would be entitled to an acquittal, if it appeared that he acted under an honest belief that he had a legal right to take the property, however ill-founded that belief should prove to be." And he further instructed them as follows: "Had he such a belief, that is, a real and not a pretended belief, that he had authority by law so to do? A mere opinion or theory of abstract right, regardless of law, would not be a justification. A mere loose opinion that it would be just and right, independently of and without regard to law, to take the property, would not be such a belief. In judging of the existence of such a belief, the jury would have a right to consider what reasons and grounds of belief he had. If he had no right to take the property, and no show or color of such a right, and no reason to suppose he had such a right; or if he ought to have known better, and the jury think he did know better than to suppose he had such a legal right; then by the terms of the proviso the defendants are entitled to a verdict. If the defendants overcome any inference that may be drawn from the testimony that in attempting to take the property Cluff acted under an honest belief that he had some legal right to take it; if they satisfy the jury that he had no color of title or right in or to the property, nor of legal authority to take it; and that he made no claim of any such title or right, or of any authority, except that, having a debt against the owner, he claimed a right to seize the property in payment by way of self-redress without regard to law, the defendants would be entitled to the verdict. Such a claim would be a claim of the privilege to commit a crime, which the law will not recognize to be honestly made as a claim of right. A claim to self-redress on the ground of the unsettled state of the country, and any supposed difficulty of getting legal redress, would not be such a claim of right as the law would recognize as furnishing a legal excuse for an act in other respects unlawful."

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The jury again found for the plaintiff; and the defendants alleged exceptions, which were argued on March 21, 1868, by the same counsel.

CHAPMAN, C. J. This case is now before us for the fourth time upon the same evidence as to the circumstances under which Cluff came by his death.

The learned judge who presided at the first trial ruled that upon the evidence the defendants were liable as matter of law; but the testimony of the two witnesses which is reported differs materially as to the particulars of the transaction, the statements of one of them tending to prove that Cluff came by his death in the known violation of criminal law, and the statements of the other tending to show that he was not thus killed. The court held that it should have been left to the jury to decide, under proper instructions, how he came by his death.

Upon a second trial, the case was submitted to the jury; but, exceptions having been taken to the instructions, it was held that they were inaccurate in one particular; and it was indicated pretty fully in the opinion what the instructions should be.

On the fourth trial the rulings were in substantial conformity with this indication. The defendants presented at the trial, and requested the court to adopt, in instructing the jury, several legal propositions. They were not adopted in form; but were substantially adopted, with a single exception. Among them was the proposition that Cluff must be presumed to have known the civil law of Louisiana. This was not adopted. But, the judge having stated to the jury that Cluff had no right to take the property, the material question to be submitted to them on this point was, whether he took it with a felonious intent, and not whether he took it with a knowledge that he was violating the civil law of the state. As to the felonious intent, the instruction given was, that he must be presumed to have known the criminal law of Louisiana, and we think this was sufficient, because it includes all that he is presumed to have known respecting his civil rights, so far as such knowledge affects criminal intent. Beyond this, the judge was not bound to go. If he had given the instruction requested, it would have been necessary to ex-

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plain its bearing on the case, in order to prevent the jury from being misled by it into the belief that they must find for the defendants if they should believe that Cluff knew he was acting in violation of the civil rights of the person who killed him. It was within the discretion of the judge to state the general proposition which covered the whole subject, and omit the more particular statement of a subordinate proposition that would require explanation in order to guard the jury against being misled by it. *Exceptions overruled.*

DENNIS CRONAN *vs.* AMANDA C. COTTING.

A debtor transferred to the administratrix of the estate of his creditor acceptances of a third person with directions to apply the proceeds, or so much thereof as might be necessary, to discharge his indebtedness to the deceased. The administratrix brought suit on the acceptances in her representative capacity, recovered judgment, and out of the proceeds of the execution applied to the estate of the deceased a sum larger than was actually due from the debtor. *Held*, that she was responsible to the debtor in an action against her individually for the balance so misapplied, as money received by the defendant to the plaintiff's use.

A debtor who had given a sum of money to the administratrix of the estate of his creditor to apply to payment of the balance actually due from him to the intestate so much thereof as might be necessary, sued her individually to recover part of the amount applied by her, on the ground that it was in excess of the actual balance; and in support of his case proved errors in accounts rendered to him by the intestate in his lifetime. The defendant, notwithstanding these errors, relied on admissions of the plaintiff, both before and since the death of the intestate, that he owed such a balance as she applied. The plaintiff, in reply, being admitted without objection to testify as a witness in his own behalf as to matters since the appointment of the administratrix, was asked "when he first discovered what he claimed to be errors in the accounts." *Held*, that the question was competent in form, and not objectionable, under the Gen. Sts. c. 131, § 14, on the ground that it related to acts done prior to the appointment of the administratrix.

CONTRACT for money received by the defendant to the plaintiff's use. In the superior court the case was referred to an auditor to hear the parties and state the accounts, whose report showed these facts:

The defendant was administratrix of the estate of her husband, John G. Cotting, between whom, at the time of his decease in 1862, and the plaintiff, there were unsettled accounts;

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and the plaintiff, shortly after the appointment of the defendant as administratrix, sent to her certain acceptances of Jacob Stanwood, with directions to apply the proceeds thereof, or such part of such proceeds as should be needful for the purpose, to pay whatever balance was actually due from him to the estate of the intestate. The defendant, as administratrix, sued the claims against Stanwood, recovered judgment, and applied so much of the proceeds of the execution as was necessary to pay a balance which she claimed as due to the estate; and the auditor found that the amount thus applied exceeded by $3922.25 the balance actually due.

At the trial, before *Brigham*, J., the report was put in evidence by the plaintiff. The defendant then asked the judge to rule that the plaintiff could not maintain the action against her individually, inasmuch as she sued the claims against Stanwood as administratrix; but the judge ruled otherwise. The trial proceeding, the defendant relied on repeated admissions of the plaintiff, both before and since the death of the intestate, of a balance due from him to the intestate such as she claimed; and contended that certain errors in the accounts which the intestate was in the habit of sending quarterly to the plaintiff, (which errors formed the basis of the auditor's finding,) were so manifest that they must have been observed and corrected between the plaintiff and the deceased in his lifetime; and that such correction must have been made by a payment from the deceased to the plaintiff without taking a receipt, or else such receipt, if ever taken, had been lost or destroyed.

In reply, "the plaintiff was offered as a witness in his own behalf as to matters occurring since the appointment of the defendant as administratrix; and was asked when he first discovered what he claimed to be errors in the accounts. The defendant objected, on the ground that the question embraced a period before the death of the deceased, and was not confined to the limitation contained in the statute in case of such a witness; that he could only testify to acts done and contracts made since the defendant's appointment, and not what he knew or did not know before then. The defendant also objected to the use of the

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word 'discover' in the question, as implying or assuming the existence of an error; but admitted that the plaintiff might state any material act or thing which he had seen, or which the defendant had done or said, since her appointment. The judge overruled the objection, and permitted the plaintiff to state that he never discovered the things claimed to be errors in the accounts until in 1864, when his accounts were examined with reference to a settlement with his partner." "The plaintiff was also asked when he first saw and examined the books of the deceased. The defendant objected on the same ground, contending that he could be asked only as to what he had seen, or whether he had seen the books since the defendant's appointment; and not when he first saw them, because the question embraced a time before as well as after said appointment. The judge said that the evidence was competent to explain the plaintiff's conduct and his alleged admissions, and permitted the plaintiff to answer the general question, when he first saw the books; and he answered in substance that he first saw them in 1864."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

A. A. Ranney, for the defendant.

J. G. Abbott, (*B. Dean* with him,) for the plaintiff.

Colt, J. The delivery of the acceptances to the defendant as security for the payment of a debt due or supposed to be due to the estate of her intestate created an obligation binding upon her personally to pay over to the plaintiff the avails thereof not needed to satisfy such indebtedness. The fact that she described herself as administratrix in a suit upon these securities cannot affect the relations of these parties. She could only bind herself in this transaction. She had no power to bind the estate she represented. The balance of the money collected, after paying the debt due from the plaintiff, was not assets of the estate in her hands; and the defendant is not liable for such balance in her representative capacity. This action is accordingly well brought for money received by the defendant to the plaintiff's use. *Ashby* v. *Ashby*, 7 B. & C. 444. 2 Williams on Executors, 1511.

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At the trial, the plaintiff was examined, without objection to his competency as a witness, to testify as to matters occurring since the appointment of the defendant as administratrix. And the only objection of the defendant now open to her is, that he was permitted to testify to a fact existing before such appointment, to wit, his want of knowledge of the existence of certain errors in the accounts between himself and the intestate. The defendant relied on acknowledgments made by the plaintiff both before and after the death of the intestate, of the balance claimed to be due from him to the estate. It was competent, if the plaintiff is to be regarded as coming within the terms of the last clause of the proviso in the statute making parties witnesses, for him to deny or explain such admissions made since the appointment of the administratrix. Gen. Sts. *c.* 131, § 14. The weight of any such admission would be entirely taken away, if made in ignorance of an existing error in the account. And this fact the plaintiff may testify to, although it should incidentally impair the effect of admissions made before the death under the same conditions of ignorance. The plaintiff cannot be deprived of the right to explain the latter admissions, because such explanation must necessarily qualify former statements. The form of the question put to the witness in this case seems unobjectionable. It is difficult to frame a question which shall direct the witness to the fact inquired of that will not be equally open to objection. The question when he first discovered what he claimed to be errors in the accounts is not a leading question. *Exceptions overruled.*

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JOSHUA D. BALL, administrator, *vs.* ELIZABETH J. WYETH, executrix.

Whether the legislature has a right, under the Constitution, to give an action for the recovery of a debt already barred under a general statute of limitations, by a statute passed after the bar is complete, *quære*.

It is competent for a creditor who holds a mortgage or other security for a subsisting debt to absolve the debtor from personal obligation and agree to have recourse to the security alone for payment.

W., to save his relative and friend J. harmless on a credit which J. opened in W.'s favor upon a banker, and to secure the payment of whatever was due or might become due from himself to J., gave to J. a mortgage of various lots of land, including one known as the A. estate. J. assigned this mortgage, except so much as covered that estate, to L., who thereupon paid all of W.'s debt to J., except a balance of fifteen thousand dollars to become due on the credit. W. then, by a deed absolute in form and with full covenants of warranty, conveyed the equity of redemption of the A. estate to J., for the expressed consideration of fifteen thousand dollars, which J. then at W.'s request agreed to pay and did pay to L., who thereupon assumed payment of the balance on the credit. W. gave to J. no note or other form of personal obligation for this sum; and in J.'s agreement to pay it to L. it was described as money paid for the A. estate. At the same time, and as part of the same transaction, an indenture was executed between J. and W., in which J. leased to W. the A. estate for an annual rent, and it was agreed that W. should have the right to redeem the estate within a certain time, and that, after a certain other time, J. should have the right to sell the estate without notice or liability to account, if W. should not have exercised his right of redemption. The term of the lease and the time of the option of redemption were subsequently extended by mutual agreement; and neither then nor in any of the other subsequent dealings of the parties was any reference made to any existing debt of W. to J.; and J. subsequently also named W. one of the residuary legatees in his will, without any intimation that W. was his debtor. *Held*, that the conveyance of the equity of redemption of the A. estate to J. extinguished and satisfied the debt of W. to J. which grew out of the letter of credit, and relieved W. from any personal obligation to J. on account thereof.

BILL IN EQUITY filed May 28, 1864, on the St. of 1861, *c.* 174, § 2, and the St. of 1863, *c.* 235, by the administrator of the estate of Leonard Jarvis within this Commonwealth, against the executrix of the will of Nathaniel J. Wyeth, to recover the amount of a claim formerly sought to be enforced in an action at law by the same plaintiff against the same defendant, as reported 8 Allen, 275, and then decided to be barred, (if valid ever,) by the statute of limitations in favor of executors and administrators. The case was reserved by *Wells*, J., for the determination of the full court, and is stated in the opinion.

J. D. Ball, pro se.

H. W. Paine, for the defendant.

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Hoar, J. It is to be regretted that the claim which is the foundation of the present suit was not passed upon when it was before us in the action at law. *Ball* v. *Wyeth*, 8 Allen, 275. It was then decided that the defendant was protected by the special statute of limitations in favor of executors, and it was therefore unnecessary to determine whether the claim was valid upon other grounds. But this suit is brought under the provisions of the St. of 1861, *c.* 174, § 2, and the St. of 1863, *c.* 235, which were passed for the purpose of furnishing a remedy to a creditor of a deceased person whose debt was barred by that special statute of limitations, when he had not been guilty of culpable neglect in failing to collect it at law, and when justice and equity might require it to be enforced.

We see no reason to modify the expression of the grave doubt which was suggested in *Prentice* v. *Dehon*, 10 Allen, 353, of the authority of the legislature to give an action for the recovery of a debt already barred under a general statute of limitations, by a statute passed after the bar is complete. But, without determining that point, or considering how far there would be any requirement of justice and equity that this suit should be maintained, the court are of opinion that there was no debt due to the plaintiff's testator for which he was entitled to an action against the defendant's testator, irrespective of the statute of limitations, at the time this bill was filed.

There is no doubt of the principle for which the plaintiff contends, that the original letter of credit created a debt from N. J. Wyeth to Jarvis, for which a mortgage was given; and that giving a mortgage or other security for a subsisting debt does not extinguish or merge the personal liability. But there can be as little doubt that it is competent for parties to agree that the creditor shall look only to the security for his reimbursement, and that the debtor shall be absolved from all personal obligation; and such, we are satisfied from the whole evidence in the case, was the understanding and agreement between the parties to this transaction.

The mortgage which was given to save Jarvis harmless from the letter of credit on George Peabody, and to secure the pay-

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ment of whatever was then due, or might become due, from N. J. Wyeth to him, included a large number of pieces of land, of which the "Assabet estate" was one; and was executed on the 20th of August 1851, the same day on which the letter of credit issued. This gave to Jarvis all the security which the Assabet estate, as a mortgage, could afford. Leonard J. Wyeth having become liable to Jarvis to guarantee him against loss by reason of the letter of credit, to the extent of one half thereof, this mortgage was transferred to him, except so much of it as covered the Assabet estate; and he thereupon paid all of N. J. Wyeth's debt to Jarvis, except $15,000 to become due under the letter of credit. To meet this $15,000, N. J. Wyeth, by a deed absolute in form, and with full covenants of warranty, conveyed the "Assabet estate" to Jarvis, for the consideration of $15,000, which Jarvis, at his request, paid to Leonard J. Wyeth, who thereupon assumed the payment of the whole amount due upon the letter of credit. An indenture was executed at the same time between Jarvis and N. J. Wyeth, by which the latter was to have the right to redeem the Assabet estate within a time limited, upon certain specified terms and conditions, and a lease of it was made from Jarvis to Wyeth for an annual rent of $900. All the instruments were dated on the 17th of August 1852, and were parts of one transaction.

The form of this transaction was, the sale by N. J. Wyeth of the equity of redemption of the Assabet estate, and applying the purchase money to the discharge of the mortgage debt. He was a relative of Jarvis, and undoubtedly upon terms of friendship with him. He gave no note or other form of personal obligation for the $15,000. It was expressed as the consideration of the purchase of the estate; and in the agreement for the payment of it to Leonard J. Wyeth, it was spoken of as the money paid for the land. The indenture of defeasance executed at the same time, by which it was stipulated that N. J. Wyeth might redeem or repurchase the estate, may have made it, in the view of a court of equity, a mortgage. But while equity will sometimes treat as a mortgage a conveyance absolute in form, accompanied by an agreement for a reconveyance, it does not

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follow that equity will therefore assume or create a personal legal liability which the parties have not established or recognized. The provision that, if the money was not paid within six years, Jarvis should be at liberty to sell the estate without notice or liability to account, even if it would not have been supported in equity as a restriction on the right of redemption, furnishes strong proof that the parties did not intend a continuing personal liability. The fact that a lease was immediately taken, and that the only payment which Wyeth covenanted to make was of rent and not of interest, tends to the same conclusion. The subsequent conduct of the parties; the absence of any subsequent allusion to any debt existing; the fact that, when the renewal of the lease and the extension of the time of redeeming the land were made, it was merely of the rights in the land, and without any reference to any obligation on the part of Wyeth to pay unless he should elect to redeem, show that it was not regarded as a debt. It is also to be noticed that each of the parties made his will after 1852, Jarvis making Wyeth one of his residuary legatees, without any intimation that he was a debtor to the estate; and Wyeth leaving it optional with his executors to redeem the Assabet estate or not as they should think expedient. This last fact is not perhaps evidence of the understanding of the parties in 1852, but it coincides perfectly with the interpretation which we have given to their previous dealings.

We are therefore, on the whole, of opinion that, when the conveyance of the Assabet estate was made in August 1852, it was the intention and understanding of the parties that it should operate as an extinguishment and satisfaction of the debt from Wyeth to Jarvis which grew out of the letter of credit; that no note or bond was given, because it was agreed that Jarvis should rely wholly upon the real estate for his security; that the value of the estate was supposed to be so great that it would be for the interest of Wyeth to redeem it, and the chief care was taken to secure to him the right to do so within reasonable limits; and, as equity will not raise a personal obligation which the parties did not contemplate, that the judgment in this suit should be *Bill dismissed with costs.*

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ELBRIDGE WASON, administrator, *vs.* WILLIAM G. COLBURN, administrator.

SAME *vs.* WILLIAM G. COLBURN.

A policy of insurance, effected by the assured on his life, and expressed to be payable, on his death, "to his heirs or representatives," is not expressed to be for the benefit of any third person within the meaning of the Gen. Sts. *c.* 58, § 62, but is payable to the administrator as assets of the estate of the deceased; and oral declarations of the assured, after receiving it, that he intended it for the benefit of his son, are inadmissible to vary its construction, and insufficient to raise a trust in respect to its proceeds.

TWO ACTIONS OF CONTRACT by the administrator of the estate of Henry E. Sanderson; the first against William G. Colburn as administrator of the estate of Elbridge L. Sanderson; and the second against Colburn individually; to recover, as money received by the defendant to the plaintiff's use, the proceeds, collected by the defendant from the John Hancock Life Insurance Company, of a policy of insurance by them made on the life of said Elbridge L. The cases were submitted together for the determination of the full court on the following facts agreed:

The John Hancock Life Insurance Company issued to Elbridge L. Sanderson the policy in question, in July 1866, as an endowment policy for ten years, containing this clause: "The said company do hereby promise and agree to and with the said assured well and truly to pay the sum insured to the said assured, or, in case of prior decease, to his heirs or representatives." The assured died in September 1866, having survived his wife, and leaving as his sole heir his minor son, Henry E. Sanderson, who died in September 1867. Colburn, as administrator of the estate of Elbridge L., which was insolvent, collected from the insurers $4,583.64 upon the policy, in January 1867, and included the sum in his inventory.

It was further agreed (if the fact was admissible on the question of the construction of the policy) that soon after effecting the insurance Elbridge L. declared orally that it was intended for the benefit of his said son.

C. A. Phillips, (*D. A. Gleason* with him,) for the plaintiff. The policy was a contract to pay a certain sum either to the

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assured in July 1876, or to the parties designated, in case of his prior death; which last having occurred, it became an ordinary contract of life insurance, payable to a third person. *Valton* v. *National Assurance Society*, 22 Barb. 9. The plaintiff's intestate is the party designated in the policy, for whose benefit the insurance was made; and the title to the proceeds of the policy vested in him upon the death of the assured. Gen. Sts. *c.* 58, § 62. *Loos* v. *John Hancock Insurance Co.*, decided in the supreme court of Missouri, October term 1867, [41 Missouri, 538.] The term "heirs" is a good *designatio personæ*. *Shaw* v. *Loud*, 12 Mass. 447. 2 Washb. Real Prop. 274. This construction of the policy would be undoubted, were it not for the term "representatives;" but that term, being more general, cannot be allowed to control or contradict the term "heirs," which has a specific meaning. *Lyman* v. *Clark*, 9 Mass. 238. Child or children satisfies the meaning of the term "representatives;" 2 Steph. Com. (5th ed.) 213; *Mayo* v. *Boyd*, 3 Mass. 13; *Palin* v. *Hills*, 1 Myl. & K. 470; and, being consistent with "heirs," is to be adopted as the interpretation of the term, rather than executor or administrator, which is inconsistent with the preceding term, and renders it impossible to ascertain the party in interest from the contract. It may be that the parties intended to follow the words of the statute. Gen. Sts. *c.* 58, § 62. The utmost which the defendant can claim is, that the language is ambiguous; and in this view of the case evidence of the intentions and declarations of the parties to the contract is admissible, to show the meaning which they attached to the terms used. Even if the policy was for the sole benefit of the assured, his declarations amount either to an assignment, or to a declaration of trust for the benefit of the plaintiff's intestate.

W. G. Colburn, pro se, was not called upon.

CHAPMAN, C. J. The policy is not expressed to be for the benefit of any third person within the meaning of Gen. Sts. *c.* 58, § 62.* It was primarily intended to be for the benefit of

* The material part of the Gen. Sts. *c.* 58, § 62, is as follows: "When a policy is effected by any person on his own life or on the life of another,

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the assured himself, being an endowment policy for the period of ten years. In case of his decease within that period, it was made, by its terms, payable "to his heirs or representatives." Evidence of his oral declarations, made after he received it, are inadmissible to vary its construction. Nor are mere statements that it was intended for the benefit of his son sufficient to constitute a trust. Upon his death intestate within the ten years, his administrator, who is his personal representative, became entitled, by well settled principles of law, to collect the amount due, and hold it as part of the estate of the intestate.

An unpublished report of the case of *Loos* v. *John Hancock Insurance Co.*, recently decided by the supreme court of Missouri, has been cited, in which a different construction of the word "representatives" was given. It was held that a child who was the sole heir of the assured was entitled to the money as against the administrator, on the ground that when it is intended that it shall go to the administrator the invariable language of policies is "to pay the said assured, his executors, administrators and assigns;" and that the changing of the language and use of terms of different expression clearly import that the money was intended for the benefit of the heirs or next of kin, and that it was not to be administered as assets by the executor or administrator. In the present case, the language habitually used by the company is not stated; nor would evidence be admissible of the intent with which they used the language of the policy. The term "representatives" legally indicates administrators, and we cannot construe it as excluding them.

Judgment for the defendant.

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expressed to be for the benefit of such other or his representatives, or a third person, the person for whose benefit it was made shall be entitled thereto against the creditors and the representatives of the person effecting the same."

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WILLIAM MURRAY *vs.* JEDEDIAH C. STANTON & another.

A. paid to B. bonds of a railroad corporation for goods bought; agreed to deliver to B. within a certain time similar bonds indorsed by another corporation, on condition that B. should upon such delivery restore the bonds first named; and failed to do so, although B. at the end of the time tendered to him said first named bonds. B. then sued A. on the agreement; and while the action was pending B.'s bonds were stolen. *Held*, that, without delivering those bonds to A., although the inability to do so resulted from theft, B. could recover only the excess of the value of the indorsed bonds over the value of the bonds stolen; that the circumstance that the stolen bonds had no market value was not conclusive that they had no value in fact; and that to show that they had some actual value evidence was admissible that they belonged to a set of bonds secured by a mortgage of the road, a section of forty miles of which had been graded and "was worth about the amount of the bonds" of that set.

CONTRACT on an agreement dated April 30, 1861, and signed by the defendants, reciting that whereas they had bought a bill of clothing, amounting to $2500, from the plaintiff, and in payment therefor had delivered to him "three mortgage bonds of the Illinois Southern Railroad Company, numbered respectively 48, 49 and 50, for $1000 each, now, in consideration of one dollar to us paid by said Murray, we hereby guarantee to said Murray, or his legal representatives, to deliver to him or them, within six months from the date hereof, two bonds of the said railroad company for $1000 each, and one bond of said railroad company for $500, each of said last mentioned bonds to be fully indorsed by the Ohio and Mississippi Railroad" and two other railroad corporations named, "but said last mentioned bonds are to be delivered to the said Murray upon the express condition that he shall upon said delivery restore to us the bonds first above mentioned." The declaration alleged due demand by the plaintiff for the indorsed bonds, accompanied by a tender of the three bonds first named; and the refusal of the defendants to fulfil their agreement. Writ dated June 15, 1865.

The answer admitted the making of the agreement by the defendants; and, at the trial in the superior court, before *Lord*, J., without a jury, it was admitted that the defendants did not deliver to the plaintiff the indorsed bonds stipulated for. The

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plaintiff introduced evidence that, at the expiration of the stipulated time, and repeatedly afterwards, he offered to restore the other bonds to the defendants, and demanded of them the indorsed bonds instead; and that, after the commencement of this action, his shop was broken into by a burglar and the other bonds were stolen from his safe, or destroyed; and he offered at the trial to execute an assignment of them to the defendants.

He further introduced evidence, which was not controverted, that such indorsed bonds ever since the date of the agreement were worth par in the market; and "also evidence tending to show, and which of itself did show, that the bonds received, at the time when the indorsed bonds were to have been delivered, and up to the time when this suit was brought, had no market value, and were worth nothing in the market in Boston or elsewhere," that they were dated October 1, 1860, with coupons attached for the interest, which was expressed to be payable annually at a bank in New York, and that no coupon of any such bonds had ever been paid.

On the question of the value of the bonds received, the defendants introduced much evidence, including testimony that in 1861 and 1862 they were contractors for building the railroad of the Illinois Southern Railroad Company, and had graded forty of the hundred miles which was the projected length of the road, when in 1862 work on the road was wholly stopped by reason of the civil war, and had never been resumed, nor had any part of the road ever been equipped; that such bonds to the amount of about $250,000, secured by a mortgage of the road to trustees, were issued by the company, and in great part paid to the defendants for their work on the section of forty miles graded, which section, they testified, "was worth about the amount of the bonds." The plaintiff objected to all the evidence thus offered, as incompetent "upon the question of the market value of the bonds received;" but the judge admitted it *de bene esse*.

"The defendants contended that the plaintiff could not recover; or not, without surrendering the bonds received by him, or giving a bond to indemnify the defendants against any claim

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on account of them, recover more than the difference between the market value of the bonds received and those which the defendants agreed to give. The judge ruled that the plaintiff, upon delivering to the defendants an assignment of the bonds received by him, and stolen or destroyed, as he was ready to do, was entitled to recover the amount of the indorsed bonds with interest from the date when they were to have been delivered." "And it being agreed that the bonds received had no market value either in Boston or New York, and there being no evidence deemed competent to show such a market value anywhere, the judge found, as a fact, that said bonds had no market value;" and ordered judgment for the plaintiff, for the amount of the indorsed bonds stipulated for in the agreement, and interest. The defendants alleged exceptions.

G. O. Shattuck, for the defendants.

A. A. Ramey, for the plaintiff.

Wells, J. This action is for breach of contract for an exchange of bonds. The plaintiff was entitled to receive indorsed bonds "upon the express condition that he shall, upon said delivery, restore to" the defendants other bonds held by him. Upon breach of this contract by the defendants the plaintiff became entitled to recover his damages. By the case stated in the exceptions the bonds held by the plaintiff had become his property in payment for goods. Neither the contract for an exchange, nor the offer and demand of fulfilment, operated to change the title of the respective parties to either set of bonds. By surrendering to the defendants the bonds held by him, or bringing them into court for them, the plaintiff might have entitled himself to recover the full value of the indorsed bonds. But he was not obliged to do this. After breach of the contract by the defendants, he might retain and dispose of the bonds held by him, without losing his right to recover for the breach. The rights and liabilities of the parties were fixed by the failure of the defendants to deliver the indorsed bonds at the stipulated time. The measure of damages is the same as in the case of a contract for exchange of any other kind of property; to wit, the difference of value at the time of the breach. The loss of the

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bonds, after breach of the contract, only deprived the plaintiff of the power to surrender them, or bring them into court, and recover the full value of the indorsed bonds. It cannot operate to defeat his right of action, but only to limit his recovery to the difference of value. The breach of the contract does not entitle the plaintiff to throw the loss of bonds upon the defendants, and to compel them to accept an assignment of his interest, which may avail them nothing, instead of the bonds themselves. We are of opinion that the ruling upon this point, at the trial, was wrong; and that the plaintiff can recover only the difference of value between the two sets of bonds, without delivering to the defendants the bonds which they were to have in exchange.

If the lost bonds were in fact of no value at the time the contract was broken, the plaintiff would be entitled to recover the full value of the indorsed bonds; and, of course, the defendants would, in that case, have no ground of complaint against the judgment in the court below. The judge who heard the case, after ruling "that the plaintiff, upon delivering to the defendants an assignment of the bonds received by him, and stolen or destroyed," "was entitled to recover the amount of the indorsed bonds and interest," proceeded to find "as a fact, that said bonds had no market value," and rendered judgment accordingly for the amount of the indorsed bonds and interest.

From the manner in which this latter conclusion was reached, we cannot regard the finding, "that said bonds had no market value," as equivalent to a finding that they had no value in fact. If it was so intended, we think the judge erred in holding that there was "no evidence deemed competent to show such a market value anywhere." A market value, as signifying a price established by public sales, or sales in the way of ordinary business, as of merchandise, is not necessary to the assessment of damages, or the appraisal of property that is the subject of a judicial valuation. Property is often the subject of such legal valuation, for which no proof of value in the market could be given, because it is not brought into the course of trade, and is not known in the market, and therefore is incapable of any esti-

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mate in that mode. In such cases the real value is to be ascertained from such elements of value as are attainable. The promissory note of an individual may have no market value. But proof of the solvency of the maker, or that the note is secured on real estate, in whole or in part, would require that some value, according to the fair estimate of its probable proceeds, should be put upon it. Reverse the present case, and suppose the defendants to have delivered the indorsed bonds according to their contract, and that the plaintiff had withheld the other bonds, can it be maintained that their right to recover anything would depend upon their ability to prove a market value? The competency of the proof offered in this case is the same as it would be in the case supposed. When there is "a market value," it shows the price at which either party may have relief from the consequences of the default of the other; and therefore it properly measures his damages. But when there is no such standard, the damages must be estimated from other means of valuation. Without discussing the evidence which related to market value strictly, or evidence of facts occurring long since the breach of the contract, we are satisfied that the testimony of the defendants that the bonds, ($250,000 in all,) were secured by a mortgage on the road to trustees; that about forty miles of the road had been graded, and "was worth about the amount of the bonds," was competent to prove value in the bonds. Whatever that value was should have been estimated and allowed to the defendants in reduction of the plaintiff's demand.

We do not understand that any question was raised as to the means by which the defendants sought to prove these facts. The plaintiff objected generally to all the evidence, "as not competent evidence upon the question of market value of the bonds received." The court so held it; and, finding no "market value," gave the plaintiff the full amount of the indorsed bonds.

Upon whichever ground the final conclusion was reached, the defendants are entitled to have their

Exceptions sustained.

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Lemuel Kempton *vs.* Mellen Bray & another.

One appointed by the patentee of a machine, although for a valuable consideration and by an instrument in terms irrevocable, to be his "sole agent for the manufacture and sale" of such machines in this state, and to retain a commission on the proceeds of sales in compensation for his services, and pay to the patentee the balance after reimbursing to himself the cost of manufacturing and selling, cannot maintain a bill in equity for an injunction on the patentee, or his subsequent assignee of the patent right, against here manufacturing and selling machines under the patent.

Bill in equity, filed on the 25th of September 1867 by Lemuel Kempton against William Woodbury and Mellen Bray, for an account, an injunction and other relief. The answer, among other defences, set up that the plaintiff had an adequate remedy at law. Hearing upon bill, answers, replication and proofs, before *Wells*, J., who reported the case for the decision of the full court, in substance as follows:

William Woodbury, having obtained letters patent from the United States for "an improved tackle for fore and aft sails," called "Woodbury's patent boom spring traveller," on the 10th of August 1864 executed to Kempton a deed, of which the following is the material part: "I, the said Woodbury, have sold, assigned and conveyed, and do by these presents sell, assign and convey unto the said Kempton, his administrators and assigns, one undivided half part of all right, title and interest in, to and under said letters patent, within and for the states of California and Oregon, and the territory of Washington, to have and to hold to him, the said Kempton, his legal representatives and assigns, for and during the term for which said letters patent are granted, as fully and entirely as I might have held and enjoyed the same if this assignment had not been made. And I hereby constitute and appoint said Kempton to be my sole agent for the manufacture and sale of such tackle in the states and territory above mentioned, and also in the states of Maine, New Hampshire, and Massachusetts except the county of Essex. But nevertheless said manufacture and sale are to be carried on, and the proceeds of such sale to be accounted for, in accordance

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with an indenture of even date herewith between myself and said Kempton."

By that indenture, in consideration of said assignment and appointment, Kempton agreed to conduct the business of manufacturing and selling such tackle in a reasonable and business-like way, to keep books of account open to Woodbury's inspection, to advance the sum of three hundred dollars towards starting the business, and to render accounts of sales and expenses every three months; and Woodbury agreed that he would "not appoint any other agent for said territory, nor attempt to revoke the appointment of" Kempton, "but such agency shall be, by force of this agreement, (if it is not so already,) irrevocable, and shall continue for and during the term for which said patent is granted;" and Woodbury agreed to repay said sum of three hundred dollars in one year with interest, and, in case he should not do so, "to execute a legal and proper assignment to said Kempton of the remaining undivided half of the right, title and interest under said patent within and throughout Oregon, California, and Washington Territory, and also the states for which said Kempton is agent." "The said Kempton shall retain ten per cent. of the gross amount of receipts from such business, after deducting the amount paid as interest on capital, as above provided, and the expense of advertising, as his commissions; and from the remainder shall reimburse himself for the cost of manufacturing such tackle, and the cost of selling it, other than advertising. The remainder he shall pay over to said Woodbury, unless it is received from sales made in California, Oregon, or Washington Territory, in which case he shall retain one half of the remainder for his own use. Either party may make sales within his own territory, to any vessels, regardless of what port they belong to, but neither shall sell such tackle for resale within the district of the other."

Kempton, in pursuance of said assignment and indenture, engaged in the manufacture of said tackle, hired a shop and counting-room, advertised and circulated handbills, and continued to make and sell such tackle ever since.

On the 28th of September 1865 Woodbury assigned to Mel-

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len Bray all his right, title and interest in the letters patent, subject to the terms and stipulations of an agreement of the same date by which Bray agreed to pay a consideration of four thousand dollars; both parties agreed to use their best exertions in selling and disposing of said tackle, applying it to vessels, and bringing it into general use; Bray was to receive all the proceeds of sales, and keep accounts open to Woodbury's inspection; and "the net profits arising from the manufacture and sale of said invention and improvement, or of rights under said letters patent, shall, after the deduction of all expenses incurred in such manufacture and sale, be divided equally between the parties to this agreement, share and share alike, and shall be received by them in full compensation for their services."

Mellen Bray took this assignment and entered into this agreement with full knowledge of the agreements between Woodbury and Kempton; and immediately afterwards commenced and has since continued the manufacture of Woodbury's patent spring travellers in Boston, keeping an assortment on hand, showing them to customers, and issuing handbills, which were not, however, proved to have been circulated in the district to which the plaintiff claimed the exclusive right; sold the principal part of the travellers, or sent them to agents, in other districts; but sold eight within the district claimed by the plaintiff, besides eleven to the plaintiff himself.

Woodbury was frequently in Mellen Bray's shop, advising and coöperating in the interests of the business; but did not personally manufacture or sell any travellers within the districts claimed by the plaintiff, nor was he interested in the manufacture or sale by Mellen Bray, otherwise than under and in accordance with the agreement between them. On the 24th of August Woodbury transferred all his interest in that agreement to William Bray, a brother of Mellen; and never afterwards took any part or had any interest in the business. No other agent was appointed for the manufacture and sale of travellers within any of the districts for which the plaintiff claimed the exclusive right.

H. G. Hutchins, for the plaintiff.

D. H. Mason & S. Z. Bowman, for the defendants.

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GRAY, J. The franchise conferred by letters patent under the laws of the United States cannot be divided except as those laws authorize; and by those laws no transfer of less than the whole of the patent right is valid, except an assignment of an undivided share in the whole patent, or a grant of the exclusive right within a specified part of the United States, either by an express assignment of the entire right within such limits, or at least by license to make, use and vend, and to grant to others the right to make, use and vend, the patented article therein, exclusively of the patentee himself as well as of all other persons. U. S. St. 1836, *c.* 357, § 11. *Wilson* v. *Rousseau*, 4 How. 672, 686. *Gayler* v. *Wilder*, 10 How. 494, 495. *Howe* v. *Wooldredge*, 12 Allen, 21, 22.

The very instruments executed by Woodbury to the plaintiff make a careful discrimination between an assignment of an interest in the patent right, and an appointment of an agent to manufacture and sell the patented article. Within the states of California and Oregon, and the territory of Washington, they purport to assign to him and his representatives and assigns an undivided half of the patent right.

But within the states of Maine and New Hampshire, and Massachusetts, (excepting the county of Essex,) they contain no words of assignment of the right, or of agreement to assign, except upon a single contingency — which has not occurred — the patentee's failure to repay at the end of a year the sum advanced by the plaintiff. Within these limits, they do not authorize the plaintiff to convey to third persons any part of, or license to exercise, the franchise; and do not exclude or restrict the right of the patentee himself to manufacture and use the invention; but are in words and effect no more than an appointment of the plaintiff as the patentee's sole agent; in terms indeed irrevocable, yet giving him only an interest by way of commissions in the proceeds of the sales of the articles manufactured and sold by him in the execution of his agency; vesting in him no title, interest or lien, legal or equitable, in the subject matter of the power, and creating no trust or contract, which equity will specifically enforce in the absence of mistake or fraud, (of

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which there is in this case no allegation or proof,) or which is binding upon an assignee of an interest in the patent, either with or without notice of the relations between the patentee and the plaintiff; and amounting to a mere personal contract between them, for breach of which the plaintiff's remedy is by action at law against Woodbury. *Hunt* v. *Rousmaniere*, 2 Mason, 249, 250, and 8 Wheat. 203–206. *Webb* v. *Walker*, 7 Cush. 46. *Fuller* v. *Emerson*, Ib. 203. *Langdon* v. *Langdon*, 4 Gray, 189.

Woodbury not having bound himself by agreement with the plaintiff not to assign an interest in the patent itself, but only not to appoint any other agent within the territory in question; and it not being shown that he has appointed or intends to appoint Bray or any other person such an agent; it is immaterial whether an interest in the patent has or has not been duly assigned to Bray. If it has, Bray is not liable to any one for exercising the privileges of the owner of such an interest. If it has not, any remedy for an infringement by him of the patent must be sought in the courts of the United States. *Dudley* v. *Mayhew*, 3 Comst. 14, and cases cited.

The plaintiff cannot therefore maintain this bill, either against Woodbury, the original patentee, or against Mellen Bray, claiming by assignment from him.

Bill dismissed, without prejudice.

JOHN WETHERBEE, JR. *vs.* JOSEPH S. POTTER.

Whether or not the judge presiding at a trial will rule, at the defendant's request, upon the sufficiency of the plaintiff's evidence to maintain the action, before testimony is closed upon both sides, is a matter for his discretion; and no exception lies to his refusal to do so.

A., B., C. and D. agreed to buy real estate jointly; C. and D. agreed to furnish the money for the purchase; and C. agreed with D. that the drafts for the purchase money should be drawn on D., and that he would reimburse to D. one half of what D. should pay thereon. All these agreements were oral. *Held*, that the promise of C. to reimburse D. was not within the statute of frauds, as a contract for the sale of lands; and that, on a count for money paid to the use of the defendant at his request, D. could recover whatever sum was lacking from C. towards such reimbursement, notwithstanding their partnership in the purchase.

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CONTRACT, alleging that the plaintiff and the defendant agreed to join in buying a colliery in Pennsylvania, each contracting to furnish one half of the purchase money, which was $50,000; that the plaintiff paid his full share of the price, but the defendant neglected and refused to pay more than $5000, and that towards supplying the deficiency the plaintiff was compelled to pay $15,000 on the defendant's account; with a count for $18,000 as money paid to the use of the defendant at his request. The answer contained a general denial of the defendant's liability; alleged that the contract sought to be enforced was within the statute of frauds; that the plaintiff had not performed his own part of the agreement; and that whatever agreement existed was in the nature of a partnership jointly with others who were not parties to the action.

At the trial in the superior court, before *Ames*, C. J., the plaintiff testified "that in January 1865 the defendant, in company with George O. Brastow and Joseph Hayden, called at his office in Boston, and proposed to him to join them in the purchase of a lease for a term of years of land in Pennsylvania, with a right to mine coal thereon, of which Brastow then held a bond or agreement giving him the right of purchase at $50,000; that, after some conversation, it was agreed between them that Brastow and Hayden should go to Pennsylvania to examine the mine, and, if they found it to be a desirable purchase, to buy it, with the understanding that Hayden was to procure subscribers for stock in the enterprise, and the plaintiff and the defendant were to advance such money as should be required to make the purchase, the intent being to put the property, when purchased, into a joint stock or corporate organization; that it was also agreed that, as the plaintiff had an office in Boston and the defendant had not, the drafts for the money should be on the plaintiff, and the defendant should pay to him one half of whatever he should pay on such drafts; that Brastow and Hayden, immediately after this conversation, visited the mine, reported favorably upon the property, and concluded the purchase, taking a contract in writing to transfer the lease and the fixtures upon the payment of $40,000, in addition

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to $10,000 for which they at the time of taking the contract drew upon the plaintiff; that this draft of $10,000, in due course of business, was presented to and paid by the plaintiff, and the defendant promptly repaid to him one half of the amount; that in January and March four other drafts, of $10,000 each, were in like manner drawn upon the plaintiff, and forwarded for acceptance and payment, and duly accepted by the plaintiff; that of these four drafts the whole amount of the first one and $4000 towards the second were paid with funds furnished by Hayden, but the remainder, amounting to $26,000, was paid by the plaintiff; that the defendant wholly refused to furnish or pay any part of that last mentioned sum; and that all parts of the above agreements were oral, and not in writing."

He further testified "that, after the first two drafts had been paid, he and others organized themselves as a corporation, with a capital fixed at $150,000, in five thousand shares of $30 each, for the purpose of mining coal in Pennsylvania, with their place of business in Boston; that of this corporation he was president, subscribing for and taking two thousand four hundred and eighty-eight shares of the stock for himself and others, taking a certificate in his own name alone; that the entire amount of the stock was subscribed for and taken up, and certificates issued; that he received said shares for the money which he had paid out upon said drafts, and for nothing else;" "that the corporation so formed worked the mine for nearly a year, he advancing $4000 of his own funds towards the working expenses; that it proved a losing concern, and the work wholly stopped in about one year; that he still had all the two thousand four hundred and eighty-eight shares, never having sold or offered for sale any part of them; that before he had paid, but after he had accepted, all the drafts, he demanded payment of the defendant, and the defendant refused to pay, on the ground that the mode of doing the business was improper, as the failure to make any payment would produce the forfeiture of all that they had paid, and he (the defendant) had rather lose his $5000 than go any further; that he did not know that he ever told the defendant that the stock in his hands was on their joint account, or proposed to convey one half of the two thou-

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sand four hundred and eighty-eight shares to him; but that, as to those shares, he had always been ready, and was then ready and prepared to transfer one half of the number to the defendant on payment of his share of the drafts; and that the defendant took no part in the organization of the corporation, never attended any of its meetings, took none of the stock, was not notified of its proceedings, and was not requested to join in it."

The plaintiff here rested his case, and the defendant contended "that this evidence, if true, was insufficient to entitle the plaintiff to a verdict, on the ground that the contract, if proved, was void by the statute of frauds, not being in writing, and being for the sale of an interest in lands; also, because the plaintiff, by his own showing, had disposed of the property in question for a large amount of stock in a corporation, without offering any of the stock, or of the property purchased, to the defendant, or keeping it for him; and also because the contract alleged, being in the nature of a partnership, could not be enforced in an action at law." But the judge did not so rule, and declined to withdraw the case from the jury.

The defendant then called Hayden, who was the clerk and treasurer of the corporation, as a witness, with its records, which showed that the plaintiff signed an agreement, for himself "and others," to take two thousand four hundred and eighty-eight shares, to be paid for in ten days; that the articles of association limited the amount of capital, and number and par value of the shares, as described in the plaintiff's testimony; that by vote at the first meeting the directors were authorized to purchase any mining property in Pennsylvania, and proceed to work the mine; that it was voted that the stock should be paid for in ten days from the meeting; and that all the shares were "taken up and paid for," those issued to the plaintiff being paid for in the manner in which the plaintiff had testified. Hayden also testified that the company failed after working the mine for about a year, and that he was informed that all its property in Pennsylvania had been attached for debts, and gave the plaintiff notice accordingly, and afterwards told the plaintiff that it was all sold by the sheriff on execution; that he was not aware of

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any conveyance from the company to any purchaser of its property; and that the company had wholly ceased to do any business. No documentary evidence of any kind was offered to show in what way, if in any, the property had passed or been taken away from the corporation. Hayden testified also "that he gave the lease to the plaintiff, but, on cross-examination, that he thought it was a lease, but did not remember what it was; that the understanding was, that the property was to be put into a corporation, the defendant to have one fourth part of whatever might be realized; and that nothing was ever realized by the company from the working of the property."

The defendant was examined as a witness in his own behalf, and contradicted many statements in the testimony of the plaintiff, and insisted that by mutual agreement he was released from any further payment after the first draft and gave up all his interest in the property to the plaintiff. In cross-examination, he testified "that the agreement at the plaintiff's office before the purchase was, that the property, when bought, was to be put into a joint stock corporation, and that he was to be paid for his block or share in the enterprise by having one fourth part of what should be obtained from disposing of the shares, and that he did not intend and was not expected himself to be a stockholder or a member of the corporation, or to have anything to do with its organization."

There was no evidence that the plaintiff ever obtained anything from the property other than the shares allotted to him; or that the shares were of any value. The plaintiff was recalled, and denied that he had ever seen or had in his possession any lease of the property, or knew what had become of it; and denied that he ever agreed to release the defendant from his engagement to share in the enterprise.

The defendant requested the judge to rule that, in order to maintain the action, it was necessary for the plaintiff to show that he was holding one half of the property ready for the defendant; that if it was proved that he had disposed of the whole property to another person, or to a corporation, and received any consideration for such disposal of it, he could not maintain the

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action; and that the evidence would warrant the jury in finding that he had so disposed of it. The judge did not so rule, but instructed the jury "that if the plaintiff proved, to their reasonable satisfaction, that he and the defendant agreed to join in the purchase and to pay for the property in question, and that for the convenience of the parties the payment was to be upon drafts upon the plaintiff, of which drafts the defendant was to pay one half; and if the property was bought under this agreement, and the drafts were presented to and accepted by the plaintiff before any notice from the defendant that he refused to pay his half of them, or go on any farther in the enterprise of buying the property with the plaintiff; and if the plaintiff proceeded to pay them according to his acceptance; he was entitled to maintain his action. If, however, he had converted the property so purchased to his own exclusive use, or deprived the defendant of the benefit of it; that would be an effectual defence against the plaintiff's claim. But if, on the other hand, it was a part of the original agreement, that the property, when purchased, should be transferred to, or put into a joint stock corporation, to be managed and worked; and if, in pursuance of such agreement, it was so transferred; and if the plaintiff had received the two thousand four hundred and eighty-eight shares in the stock of said corporation, in good faith, in exchange for such property, and had at all times been able and ready, and was then willing and offering to transfer one half of said stock to the defendant, it would not be such a conversion of the property to the plaintiff's own exclusive use, as would be a bar to the action, even though the defendant had not participated in or been notified of the organization of said company."

The jury found for the plaintiff, and assessed damages in the sum of $14,654.89; and the defendant alleged exceptions.

J. G. Abbott, (*W. E. Parmenter* with him,) for the defendant.

A. A. Ranney, for the plaintiff.

Wells, J. The court was not bound to rule upon the sufficiency of the plaintiff's evidence to maintain the action, before the whole testimony was closed upon both sides. It is entirely a matter of discretion whether to do so or not, and is not open

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to exception. This has been too often decided to admit of any question. *Bassett* v. *Porter*, 4 Cush. 487. *McGregory* v. *Prescott*, 5 Cush. 67. *Morgan* v. *Ide*, 8 Cush. 420. *Barrett* v. *Malden & Melrose Railroad Co.* 3 Allen, 101. *Manning* v. *Albee*, 14 Allen, 8. *Bradley* v. *Poole*, 98 Mass. 179.

The principal ground of objection to the plaintiff's recovery is that the agreement is within the statute of frauds as a contract for the sale of lands, and so void. The agreement, as set forth in the special count, seems to be obnoxious to that objection. But there being also a count for money paid by the plaintiff to the use of the defendant and at his request, we must look at the facts of the case to see whether, as the question was presented to the jury, the verdict can be sustained. It appears that, in the arrangement for the purchase of the interest in lands, there were four persons concerned as parties. The contract upon which this action is brought was between the plaintiff and the defendant only. It related to the proposed purchase; but its connection therewith was merely collateral. Separated from the principal agreement, as it may be, and, for the purposes of enforcement, must be, on account of the diversity of the parties, it becomes simply, upon one side, a promise to advance money for another, at his request; and, on the other, an express promise to repay it. The money having been advanced, the obligation to repay becomes a debt, which may be enforced by an action upon the express promise, or by the general count for money paid.

The case, however, was submitted to the jury upon a somewhat different aspect. The court instructed the jury "that if the plaintiff proved, to their reasonable satisfaction, that he and the defendant agreed to join in the purchase, and to pay for the property in question, and that for the convenience of the parties the payment was to be upon drafts upon the plaintiff, of which drafts the defendant was to pay one half; and if the property was bought under this agreement, and the drafts were presented to and accepted by the plaintiff, before any notice from the defendant that he refused to pay his half of them or go on any further in the enterprise of buying the property with the plaintiff; and if the plaintiff proceeded to pay them according to his

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acceptance; he was entitled to maintain his action." So long as such an agreement continued unexecuted, it was within the statute of frauds, and liable to be avoided for that reason. The defendant might have revoked his request to the plaintiff to make advances for him, and thus terminated all liability on his part. But advances made under a voidable agreement for the purchase of land are made upon a good consideration, and cannot be recovered back, unless the contract be rescinded by the refusal or failure of the other party to convey. *Coughlin* v. *Knowles*, 7 Met. 57. If, therefore, the plaintiff made such advances for the defendant, before his request to do so had been revoked, he may recover the amount so advanced, under the general count for money paid. The statute of frauds does not apply to such an action, whether brought upon the implied or upon an express agreement. The obligation to repay money advanced for the use of the defendant is independent of the character of the consideration upon which the advance is made, provided it be not illegal. And if an express promise to that effect be separable from the principal agreement to which it is incident, it may be enforced, although the principal agreement might be avoided. The fact that a certain stipulation is made at the same time, and forms a part of an arrangement for the sale of an interest in land, does not prevent an action from being maintained upon it; provided, 1st, that the action does not tend to enforce the sale or purchase of the interest in land, and 2d, that, in other respects, the stipulation is susceptible of being separately enforced by action. Such stipulations, collateral to the sale, but contained in the same contract, have been repeatedly enforced in this Commonwealth. *Pierce* v. *Woodward*, 6 Pick. 206. *Page* v. *Monks*, 5 Gray, 492. *Brackett* v. *Evans*, 1 Cush. 79. *Preble* v. *Baldwin*, 6 Cush. 549.

The plaintiff's acceptance of drafts for the purchase money fixed the rights and obligations of the parties from that time, and the defendant was no longer at liberty to revoke his request. The instructions required the jury also to find that the property was bought before any notice from the defendant of his intention to revoke.

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It has always been held in this Commonwealth that, when all parts of the agreement which affect the obligation of either party to purchase or sell any interest in land have been fully performed, the remaining obligations are no longer within the statute, although they may have been so while the contract continued executory. *Wilkinson* v. *Scott*, 17 Mass. 249. *Nutting* v. *Dickinson*, 8 Allen, 540. *Basford* v. *Pearson*, 9 Allen, 387. The statute is satisfied by the voluntary performance, by the parties, of those undertakings of which it required written evidence. This principle was applied to cases somewhat like the present, in *Davenport* v. *Mason*, 15 Mass. 85, and *Trowbridge* v. *Wetherbee*, 11 Allen, 361.

The property was purchased, not to be held by either the plaintiff or the defendant, but was to be taken for the basis of a mining corporation. The interest which the plaintiff acquired, and in which, by the agreement, the defendant was to share, was an interest in the stock, or proceeds of the stock, of such corporation. The purchase of the interest in real estate was a step only towards the performance of the whole agreement, and was completed before the defendant gave notice of revocation.

It is held by some of the English authorities that the consideration agreed by parol to be paid for a conveyance of real estate can be recovered only upon a subsequent independent promise; the moral obligation and the previous voidable contract answering as a consideration for the new promise. *Cocking* v. *Ward*, 1 C. B. 858. *Kelly* v. *Webster*, 12 C. B. 283. *Buttemere* v. *Hayes*, 5 M. & W. 456. This doctrine may result in a measure from the rule, which is there established, that the consideration of an agreement, within the statute of frauds, must be set forth in the writing, as well as the promise. However that may be, the English authorities upon that subject have not been very closely followed by our courts. It was early decided, in *Packard* v. *Richardson*, 17 Mass. 122, that the consideration need not be set forth in the writing to be enforced, but might be proved *aliunde;* and it is now so provided by the statute itself. Rev. Sts. *c.* 74, § 2. Gen. Sts. *c.* 105, § 2.

Upon the whole, the court are all satisfied that the promise to

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repay money, to be advanced by the plaintiff at the defendant's request, although that money was advanced for the purpose of making a purchase of real estate, and upon an oral agreement to that effect, is not of itself "a contract for the sale (or purchase) of lands;" and, if the money be in fact advanced before the request is revoked, an action upon such a promise is not an action forbidden by the statute.

The cases cited by the defendant upon this point are mostly suits to enforce rights which the purchaser claimed to have acquired in the real estate under a parol agreement. The decisions are uniform in that respect.

If the arrangement be regarded as one of partnership, it would make no difference. A promise to repay money advanced by one partner for another partner, to make up his share of the joint capital, or for any other special purpose, aside from the transaction of partnership business, may be recovered without waiting for dissolution and settlement of the final balance. *Gardner* v. *Cleveland*, 9 Pick. 334. *Williams* v. *Henshaw*, 11 Pick. 79. *Rockwell* v. *Wilder*, 4 Met. 556.

The refusal of the defendant did not impose upon the plaintiff the duty to manage the property purchased in any different manner from that contemplated by the arrangement under which it was purchased. If he had disposed of it otherwise, or converted it in any way to his own exclusive use, he would undoubtedly be obliged to account for the proceeds; and the defendant might require his share to be applied towards the claim of the plaintiff against him. But that would be matter of defence. We see nothing in the case which should require the plaintiff to do more than he has done, in the way of holding the property and offering to transfer his share to the defendant, in order to maintain his action. The rulings and instructions of the court seem to us to be in all respects sufficient and proper. *Exceptions overruled.*

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EDGAR K. WHITTAKER *vs.* JAMES B. WHITTAKER & others.

A daughter, who took under her father's will an estate tail in remainder after the life estate of her mother in part of his real estate, conveyed, in her mother's lifetime, in 1830, by an antenuptial settlement, "the share or portion" which she was "entitled to receive out of the estate of her father," in trust, for the trustee "to claim, receive and take [into] possession, as soon as practicable and it shall be lawful to do so, all her share and portion aforesaid, whether said share and portion consists of real, personal or mixed property," and hold the same to certain uses, reserving to herself power to appoint other uses, "notwithstanding her coverture, by any writing under her hand and seal." In 1850, after the death of her mother, she appointed other uses by such a deed without the joinder of her husband; and a few days later joined with him in an indenture, by which the former trustee conveyed to a new trustee the trust estate, but which contained no words of grant or covenant on her part; and shortly afterwards died. *Held*, that none of these deeds barred the entail; and that her life interest only in the real estate was held in trust under them.

PETITION by the husband of Catharine C. Whittaker for the appointment of a trustee in the place of Silas F. Plimpton, deceased, in a trust raised by the marriage settlement, and deeds supplemental thereto, of said Catharine, who died on April 22, 1850, leaving several children, who were cited as respondents. The case was submitted for the decision of the full court on agreed facts, of which those that are material either appear in the opinion or are as follows:

The parties to the marriage settlement, which was executed on October 26, 1830, were the petitioner, and said Catharine, (then Catharine C. Holland, daughter of John Holland, then deceased,) and Benjamin Goddard; and the instrument, after reciting that marriage was intended between the petitioner and said Catharine, and that the latter was the owner of certain property, "being the share or portion which she is entitled to receive out of the estate of her father" under his will dated August 23, 1822, "which share or portion she is entitled to receive and become possessed of either at the arrival at full age of her youngest brother, or at the death of her mother," conveyed to Goddard and his successors in the trust "all the said Catharine's share and portion of the estate of the late John Holland, whether said share and portion consists of real, personal, or mixed property," in trust "for said trustee to claim, receive and

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take [into] possession, as soon as practicable and it shall be lawful so to do, all said Catharine's share and portion aforesaid," and hold the same to certain uses; and it was further "agreed and declared that it shall and may be lawful to and for the said Catharine, party to these presents, at any time during her natural life, and notwithstanding her coverture, by any writing or writings under her hand and seal," "to alter, change, revoke, annul and make void all and every the use and uses, estate and estates, hereby limited, appointed and declared, and any other use or uses, trust or trusts, estate or estates thereof, to limit, appoint and declare, as to her, the said Catharine, shall seem meet."

In execution of the power reserved, Mrs. Whittaker, by a writing executed under her hand and seal on March 21, 1850, without joinder of her husband, appointed other uses to which the property should thenceforth be held by the trustee. Her mother had died on July 12, 1849.

On April 2, 1850, by an indenture to which both Mrs. Whittaker and her husband, and Isaac Mansfield, the then trustee, (who on June 3, 1832, had succeeded Goddard as such,) were parties with Silas F. Plimpton, Mansfield relinquished the trust, and conveyed the trust estate to Plimpton as his successor. This indenture contained no words of covenant or grant from Mrs. Whittaker.

C. T. Russell, for the petitioner.

H. C. Hutchins, for the respondents.

Foster, J. The question is, whether any property remains to be administered under the antenuptial settlement between Mr. and Mrs. Whittaker, dated October 26, 1830, so that a trustee ought to be appointed pursuant to the provisions of that instrument.

The property embraced therein is the share or portion of Mrs. Whittaker in the estate of her father, John Holland, under his will dated August 23, 1822, "which share or portion she is entitled to receive or become possessed of, either at the arrival at full age of her youngest brother, or at the decease of her mother." It is agreed that the mother died July 12, 1849; and that the only property remaining to be affected by the marriage settle-

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ment is one fifth of a warehouse on Long Wharf in Boston. Mrs. Whittaker herself died April 22, 1850.

The will of John Holland has twice received the construction of this court. *Adams* v. *Cruft*, 14 Pick. 16. *Holland* v. *Cruft*, 3 Gray, 162. It has been held that Mrs. Whittaker took during the life of her mother an estate tail in remainder in one fifth of the real estate of John Holland. It has been likewise decided that, during the continuance of the life estate of Mrs. Holland, Mrs. Whittaker could not bar this entail; because only a tenant in tail in possession, and not one in remainder, could execute a deed effectual for this purpose, under the St. of 1791, *c.* 60, § 1. *Holland* v. *Cruft*, 3 Gray, 182. So far, there is no controversy between the parties as to the legal principles applicable to the case.

But the petitioner contends that Mrs. Whittaker did bar the entail, and that consequently the remainder after her death became subject to the provisions of the marriage settlement. He relies upon the effect of the successive instruments which she executed. They will be considered in their order.

It is claimed that the marriage settlement, upon the death of Mrs. Holland, "operated by estoppel to vest the estate in fee in the then trustee, and to bar the entail." We are aware of no authority for the position that a deed which, when made, does not bar an entail, can afterwards do so by estoppel. The conveyance by a tenant in tail which the statute of 1791 provided should have that effect was a substitute for a common recovery. It passes more than the grantor's own title; for it cuts off the rights of subsequent parties in interest. This is done by virtue of the statute, and not by estoppel. Furthermore, the marriage settlement contains no covenants which could operate to create an estoppel, and conveys only the share or portion of Catharine Holland, afterwards Mrs. Whittaker, in her father's estate. We discover no evidence of an intention thereby to bar the entail. The words of description used must be construed with reference to the extent of the grantor's power to convey. She was not then competent to bar the entail, and we cannot infer that she intended to do so.

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The next instrument relied upon is dated March 21, 1850, and was executed by Mrs. Whittaker alone, without the joinder of her husband. It manifests no intention to cut off the entail; and was valid merely as an execution of the power reserved in the settlement. A married woman whose common law deed was wholly void and ineffectual to convey her own estate could not, of course, without her husband, bar an entail and defeat his possible or actual tenancy by the curtesy in the entailed estate. Obviously, the instrument was made for no such purpose, and could have no such effect.

The indenture of April 2, 1850, is only a conveyance from Mansfield, the former trustee, to Plimpton, his successor in the trust. It does not purport to enlarge or change the trust property, but simply substitutes one trustee for another. It contains no words of grant or covenant from Mrs. Whittaker.

It seems to us that no attempt was made by Mrs. Whittaker in her life to bar this entail; certainly that it has never been done effectually. The consequence is, that her life interest only in the real estate was held in trust, and that since her death there remains no property to pass under the settlement to a new trustee. *Petition dismissed.*

Sophia Stevenson *vs.* Bedfield Erskine.

In a deed of two lots of land, separated by intervening lots, the premises were described by metes and bounds and by distances, the starting point of the boundary line of the first lot being stated as at its northwestern corner 107 feet from M. Street, and that of the second lot as at its northeastern corner 307 feet from the corner of M. Street; and were further described by abuttals upon T. Street on the north, and on the south exclusively and respectively upon lots 44 and 47 on a plan, drawn six years previously, to which the grantor made reference as meaning to convey "the westerly portion of lot numbered 36" and "the easterly portion of lot numbered 39, on said plan." And he further described the granted premises as lots 1 and 2, and lots 9 and 10, on another plan, drawn on the same date with the deed. In this second plan, which embraced only part of the territory included in the first, no express reference was made to M. Street, but figures noted at corners of the lots indicated that 107 feet and 307 feet were the respective distances of the northwestern corner of lot 1 and the northeastern corner of lot 10 from some point not indicated; and all the other distances in the deed corresponded with the distances in this plan. But in the first plan, in which M. Street was represented as running obliquely to T. Street, the northwestern corner of lot 36 and the northeastern corner of lot 39 were represented at distances respectively of 107 feet and 8 inches, and 307 feet and 8 inches,

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from the southeastern corner of M. and T. streets. Assuming the relative courses of M. and T. streets to have remained unchanged during the time between the two plans, and following out the boundary lines of the granted premises from points 107 feet and 307 feet east from the southeastern corner of M. and T. streets, the first lot conveyed would include, besides the "westerly portion of lot 36," a strip 8 inches wide along the whole eastern portion of lot 35 on the first plan, and the second lot conveyed would not include a strip of the same width along the whole "easterly portion of lot 39;" and the southern abuttal of the first lot would not be exclusively on lot 44, nor that of the second lot exclusively on lot 47. But, applying the second plan to the first plan so that the westerly line of lot 1 on the former should correspond with the westerly line of lot 36 on the latter, and assuming the variation of eight inches between the measurements from M. Street to be due either to a difference of starting points on the line of M. Street, or to a variation in the relative courses of the streets during the time between the two plans, all the courses, distances and abuttals expressed in the deed would correspond with both plans. *Held*, that the statement of the starting point of the boundary line of the first lot conveyed in the deed, being ambiguous, must be controlled by the other calls of the description of the two lots, which were certain, and must be assumed to be at the point on T. Street which at the date of the first plan was the northwestern corner of lot 36 thereon indicated; especially if such a construction was in accord with the practical construction given to the deed by the grantees or their immediate assigns in erecting a house covering the whole area so bounded.

Tort in the nature of trespass *quare clausum fregit*. Writ dated August 17, 1866. The place of the alleged trespass was a strip of land eight inches wide bounding northerly on Trenton Street in East Boston. Trial in the superior court, before *Brigham*, J., who found these facts:

On April 1, 1845, Joseph Noble conveyed to Noah Sturtevant and Ebenezer Atkins land described in the deed as "two certain lots of land lying in that part of Boston called East Boston, bounded, described and situated as follows, namely: Beginning on the southerly side of Trenton Street 107 feet from Meridian Street; there turning and running in a southerly direction 100 feet to Lot 44 on a plan hereinafter mentioned; there turning at right angles and running in an easterly direction by said lot 38 feet; there turning at right angles and running in a northerly direction 100 feet to Trenton Street; there turning at right angles and running on said street 38 feet to the point of beginning; hereby meaning and intending to convey the westerly portion of lot numbered 36 on a plan of the property of the Boyden Malleable Cast Iron and Steel Company, made by R. H. Eddy and recorded with Suffolk deeds at Lib. 448, at the close: also a lot beginning on the southerly side of Trenton Street 307 feet from the corner of Meridian Street;

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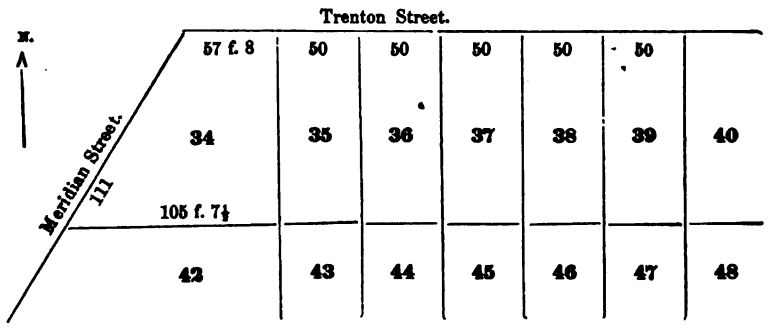
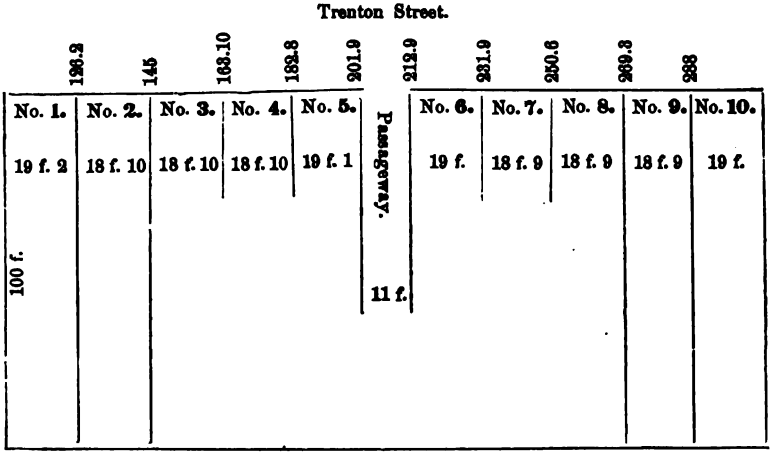
there running in a southerly direction 100 feet to Lot 47 on above mentioned plan; there turning at right angles and running by said lot in an easterly [westerly?] direction 37 feet 9 inches; there turning at right angles and running in a northerly direction 100 feet to Trenton Street; there turning at right angles and running on said street 37 feet 9 inches to the point of beginning; hereby meaning to convey the easterly portion of lot numbered 39 on said plan. The lots hereby conveyed are numbered 1, 2, 9 and 10, on a plan drawn by S. C. Bugbee, dated April 1, 1845."

The following are copies of so much of the two plans referred to as is necessary to an understanding of the case. The Eddy plan was dated May 1, 1839.

EDDY PLAN.



BUGBEE PLAN.



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Noble, also, on January 23, 1846, made a quitclaim deed to Atkins and Sturtevant, releasing to them all his right and title to "two certain lots of land lying in that part of Boston called East Boston, bounded, described and measuring as follows, viz: One of them beginning on the southerly side of Trenton Street 107 feet 8 inches from Meridian Street; there turning and running in a southerly direction 100 feet to lot 44 on a plan hereinafter mentioned; there turning at right angles and running in an easterly direction by said lot 38 feet; there turning at right angles and running in a northerly direction 100 feet to Trenton Street; there turning at right angles and running on said street 38 feet to point of beginning; hereby meaning and intending to convey the westerly portion of lot numbered 36 on a plan of the property of the Boyden Malleable Cast Iron and Steel Company, made by R. H. Eddy and recorded with Suffolk deeds, Lib. 448, at the end." "The lots hereby conveyed are numbered 1, 2," "on a plan drawn by S. C. Bugbee, dated April 1, 1845." "This deed is made" "to correct errors in description in" the deed of April 1, 1845. And on the same date, January 23, 1846, Sturtevant and Atkins made a deed to Noble, also referring to Eddy's plan, and quitclaiming to Noble "any part of lot 35 on said plan which said Noble conveyed to us by deed," of April 1, 1845. But both of these deeds of January 23, 1846, as will be noticed, were subsequent to a conveyance by Sturtevant and Atkins to Hayward on October 1, 1845.

Under the deed of April 1, 1845, from Noble to Sturtevant and Atkins, the plaintiff derived her title, through the following mesne conveyances, (in all of which the description of the premises conveyed was the same as in that deed, so far as concerned the strip of land in controversy,) namely: Sturtevant and Atkins to James T. Hayward, October 1, 1845; Hayward to Daniel D. Stevenson, the plaintiff's husband, June 24, 1851; Daniel D. Stevenson to Sturtevant, and Sturtevant to the plaintiff, both October 27, 1857.

When Hayward made his conveyance to Daniel D. Stevenson, June 24, 1851, the more westerly of the two lots conveyed by him, being the same described in the deed from Noble to

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Sturtevant and Atkins as "the westerly portion of lot numbered 36" on the Eddy plan, and as the lots "numbered 1, 2" on the Bugbee plan, "was occupied by a dwelling-house which was part of a block occupying said two lots and having a frontage on said Trenton Street of thirty-eight feet; but no part of said house then extended westerly beyond the division line between said lots numbered 35 and 36, as said line is indicated on said Eddy's plan." Daniel D. Stevenson, previously to his conveyance in 1857 through Sturtevant to the plaintiff, made use, for purposes of a way, of a strip of land eight inches wide, lying on the westerly side of said division line and extending along the whole of the easterly portion of said lot 35; and the year prior to that conveyance he added to the house gutters and a porch which extended that distance beyond the line. After Daniel D., the plaintiff occupied the strip in the same manner, under a claim of title, which, on and after May 25, 1866, was denied by the defendant; and the acts of the defendant alleged to be acts of trespass were done by him under a claim of title in himself to the strip in controversy, and depended for their justification upon his right under such claim, which he asserted by virtue of a deed of that date to him from the heirs at law of Joseph Noble, of a lot of land described as "beginning on the southerly side of Trenton Street, so called, at a point 57 feet 8 inches easterly from Meridian Street; thence running easterly on said Trenton Street 50 feet to lot numbered 36 on a plan of land and property of the Malleable Iron Company, East Boston, drawn by R. H. Eddy, dated May 1, 1839, and recorded with Suffolk deeds at the end of Lib. 448; there turning and running southerly on lot numbered 36 on said plan, 100 feet, to lot numbered 43; there turning and running westerly on lot numbered 43, 50 feet to lot numbered 34; there turning and running northerly on lot numbered 34, 100 feet to the point of departure on said Trenton Street; containing 5000 square feet, and being lot numbered 35 on said plan."

The lots numbered 35 and 36 on Eddy's plan were both owned by Joseph Noble on April 1, 1845; "and he and his heirs owned lot numbered 35 from that time until its conveyance to the defendant."

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On these facts the judge ruled that the plaintiff was not entitled to recover; and found for the defendant. The plaintiff alleged exceptions.

L. Child, for the plaintiff.

H. W. Muzzey, for the defendant.

WELLS, J. This is a question of boundary. Both parties derive title from one Noble, who was owner upon both sides of the disputed line.

The earlier deed from Noble, under which the plaintiff has title, was to Atkins and Sturtevant, April 1, 1845. By that deed, Noble conveyed, first, the westerly part of Lot 36; and, second, the easterly part of Lot 39, "on a plan of the property of the Boyden Malleable Cast Iron and Steel Company, made by R. H. Eddy, and recorded with Suffolk deeds, at Lib. 448." The first is conveyed as lots numbered 1 and 2; and the second as lots 9 and 10, "on a plan drawn by S. C. Bugbee, dated April 1, 1845." The westerly line of the first parcel runs from Trenton Street southerly 100 feet to Lot 44; and the easterly line of the second parcel runs from Trenton Street southerly 100 feet to Lot 47; and they bound southerly on those lots respectively. Upon reference to the plans, it is apparent that these abuttals are derived only from the Eddy plan; but the measurements are taken from the Bugbee plan alone. The Bugbee plan indicates no reference whatever to the lots or division lines laid down on the Eddy plan. But by applying the Bugbee plan to the Eddy plan, so that the westerly line of lot No. 1 may conform to the westerly line of lot No. 36, every point of description will correspond, and every call of the deed will be satisfied, except the distances of the starting points from Meridian Street. (We disregard a palpable error in the direction of the southerly line of the second parcel.) The west line of lot No. 1 will then strike the corner of lot No. 44. The east line of lot No. 10 will conform exactly to the east line of lot No. 39. These two lines are the extreme limits, east and west, of the Bugbee plan, which would seem to be a mere subdivision of lots 36, 37, 38 and 39 upon Eddy's plan. Those four lots being each fifty feet in width, make up a front of two hundred feet. The nearest corner

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of No. 1 is given in the deed as 107 feet from Meridian Street, and the farthest corner of No. 10 as 307 feet. Adding together the width of the ten lots as severally given upon the Bugbee plan, and the width of a passageway, the aggregate is just two hundred feet. In this respect the deed and both plans are consistent with each other.

The Bugbee plan makes no reference to Meridian Street in terms; but the deed adopts the figures, minuted at the front corners on Trenton Street, as distances from Meridian Street. Those distances are eight inches less than in Eddy's plan. The plaintiff contends that, as the deed fixes the starting point at one hundred and seven feet from Meridian Street, whereas the corner of lots 35 and 36, as given on the Eddy plan, is one hundred and seven feet and eight inches from Meridian Street, her deed must be held to embrace eight inches in width from lot No. 35. This is the *locus* of the controversy.

Against this construction are the considerations that, although Noble, being the owner of lot No. 35, as well as of lot No. 36, might be supposed to be willing to cut off eight inches from that lot for the benefit of his new plan, if there were occasion for it, yet no such occasion appears. On the contrary, such a variation of the westerly line would occasion a similar variation of the easterly line, cutting off eight inches from lot No. 39, where it would be useless, as he does not appear to have owned the adjoining land. The west line of lot No. 1 will not strike No. 44, but will strike No. 43 eight inches from the corner of No. 44. Lots Nos. 1 and 2, called in the deed the westerly part of lot 36 on Eddy's plan, will in fact embrace part of lot 35, while lots Nos. 9 and 10, called the easterly part of lot 39, will not be in fact the easterly part of that lot, but will leave an intervening strip. These considerations are strengthened by the terms and form of the deed. The description of the first parcel is followed by the words "hereby meaning and intending to convey the westerly portion of lot numbered 36," &c.; and of the second parcel, likewise, by the words "hereby meaning to convey the easterly portion of lot numbered 39 on said plan," namely, Eddy's plan. The only reference to Bugbee's plan is in the last

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clause, as follows: "The lots hereby conveyed are numbered 1, 2, 9 and 10, on a plan drawn by S. C. Bugbee, dated April 1, 1845." This language not only indicates no purpose to vary from the lines of the lots as laid down by the Eddy plan, but a clear purpose to adhere to those lines.

Undoubtedly the sale was made by the Bugbee plan, and that plan was prepared for that purpose; as the plaintiff contends. But the question is, whether that plan and the deed made from it varied the lines given by the Eddy plan, or were intended to conform to them. The plaintiff contends that they vary from those lines, because the starting point is fixed at a distance from Meridian Street eight inches less than is indicated on Eddy's plan for the corner of lot 35. But no monument or fixed point at Meridian Street is given, in the deed or in either plan, nor in the evidence, as the point from which the distance was or is supposed to have been measured. Meridian Street runs obliquely to Trenton Street, and therefore a difference in the measurement of the distance might result from a variation in the point of starting from the easterly line of Meridian Street, even if that were a fixed and certain line. The Eddy plan was made in 1839; and the Bugbee plan in 1845. There is no evidence that the lines of Meridian Street had been preserved unchanged; nor that they were established and made certain by fixed bounds. The case does not find what is the actual measurement from Meridian Street. For aught that appears, the 107 feet from that street as it now is, or as it was in 1845, may carry the boundary of lot 1 as far as to the corner of the original line of lot No. 36.

The two plans, being introduced, develop an ambiguity in the descriptions of the deed. The ambiguity consists in the uncertainty whether 107 feet from Meridian Street would fix the starting point at the corner of lot 36 or eight inches upon lot 35. The plaintiff does not show any fact to relieve the ambiguity, but relies upon the ambiguity itself to control the other descriptions in the deed, as to which no ambiguity exists. She fails therefore to give to the circumstance of a starting point 107 feet from Meridian Street such a certain and fixed character as

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would warrant the court in making the other distinct and explicit calls of the deed yield to it as a controlling bound.

The conclusion to which we thus come accords with the practical construction given to the deed by the acts of the parties. Such construction is often held to settle doubtful boundaries so as to be conclusive upon them. The case finds that in 1851, when Hayward conveyed to Stevenson, the plaintiff's lot "was occupied by a dwelling-house which was part of a block occupying said two lots, [Nos. 1 and 2,] and having a frontage on said Trenton Street of thirty-eight feet; but no part of said house then extended westerly beyond the division line between said lots numbered 35 and 36, as said line is indicated on said Eddy's plan." As the entire frontage of the two lots was but thirty-eight feet, the house would exactly cover the lots, if bounded westerly by the west line of No. 36. But, if bounded eight inches upon No. 35, the house must have extended eight inches over the east line, upon the owner of lot No. 3. If this house was built before January 23, 1846, it is a significant act by Hayward or his grantors, bearing upon the construction of the deeds in 1845, which ought to affect the plaintiff, who claims under Hayward. If the house was built after January 23, 1846, then it may be regarded as an adoption by Hayward of the lines as established by the deed of correction between Noble and Sturtevant and Atkins. Having availed himself of the advantages of the line, as so established, upon the east side of his lot, he ought to be held to have acquiesced in the corresponding application of that deed of correction or definition to the west line.

The exceptions must therefore be overruled.

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CARLTON BATES *vs.* JOHN TAPPAN.

The provision in the United States bankrupt act, U. S. St. of 1867, *c.* 176, § 14, that an assignment under the act shall vest in the assignee the title to all the bankrupt's property, "although the same is then attached on mesne process," and "shall dissolve any such attachment made within four months next preceding the commencement of said proceedings" in bankruptcy, does not prevent the enforcement of a judgment against the bankrupt on a portion of his property attached in the action more than four months before he commenced proceedings in bankruptcy.

CONTRACT on a promissory note. Writ dated March 12, 1867. By the officer's return, it appeared that on March 14 he attached all the defendant's real estate in the county of Essex. The defendant, after filing an answer to the merits, commenced proceedings in bankruptcy on August 26, under the U. S. St. of 1867, *c.* 176. On December 11 he obtained his discharge in the district court of the United States for the district of Massachusetts; afterwards pleaded the same in bar of the action; waived trial by jury and his first answer; and submitted the case, on his plea of discharge in bankruptcy, and the agreed fact that on March 14 he was seised of real estate in Essex, for the determination of the superior court, which ordered judgment for the plaintiff, "said judgment only to be enforced against the property attached on the writ, but not to be enforced against the person of the defendant or any other property;" and the defendant appealed.

G. W. Estabrook, for the plaintiff.

H. N. Merrill, for the defendant. 1. The general intent of the bankrupt act is, that all the assets of the bankrupt upon the day of the adjudication of bankruptcy shall be taken into the custody of the law, and made to discharge all the debts and claims provable under the law. The debt in suit in this case was provable. U. S. St. of 1867, *c.* 176, § 19. "No creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor." § 21. A discharge granted shall release the bankrupt from all demands provable; and may be pleaded "as a full and complete bar" to all

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suits brought on such demands. § 34. But such discharge does not operate as a "full and complete bar," if judgment be rendered and execution issue after such plea, even if the judgment be limited in its force to property attached.

2. The clause in § 14 which provides that the assignment in bankruptcy shall dissolve attachments of the debtor's property made within four months next preceding the commencement of proceedings in bankruptcy, if held to imply strictly that all attachments not made within four months shall not be dissolved, would be repugnant to the provisions of §§ 21, 34, as well as to the general intent of the statute. All conflict is avoided if it be held that the clause in § 14 implies only a saving of attachments made in suits, commenced four months before the bankruptcy, founded on any cause of action not provable as a demand against the estate of the bankrupt. Or all inconsistency in the act could be avoided by making this implied exception to the dissolution of attachments apply to cases in which an attachment had been in force more than four months in a suit in which judgment was had before the bankruptcy of the defendant; that is, to protect attachments of long standing, during the interval between judgment and levy of execution. In such cases, no judgment would be rendered contrary to the express provisions of the statute. Congress could not have intended to preserve all attachments made more than four months before bankruptcy, by a mere negative inference; especially when in the same section it makes an express reservation of mortgages only, for, having expressed itself positively upon the same subject, it may be presumed that it so expressed all that was intended. *Davenport* v. *Tilton*, 10 Met. 320, was decided on a provision in the act of 1841 in favor of all liens already attaching to the property of the bankrupt. No such provision is to be found in the act of 1867. Mortgages alone are excepted.

Wells, J. The provision in the bankrupt act, § 14, that an assignment shall be made, and thereupon, by operation of law, the title to all property, real and personal, "shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor," would imply that all such attach-

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ments are to be thereby vacated. It is a reasonable, not the necessary, inference. But it is not left to inference. The same sentence continues: "and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings." Such explicit terms do not admit of enlargement, nor of the special modifications which the defendant seeks to engraft upon the text of the statute. The provisions for a full discharge, § 34, and forbidding the prosecution of any suit to final judgment against the debtor, § 21, must be construed, as they well may be, so as not to prevent the enforcement of a lien, which the statute itself permits, by any requisite proceedings therefor which do not involve a judgment *in personam*. A lien by attachment can be enforced in no other way than by the qualified judgment which was rendered in the superior court. The entry must be therefore *Judgment affirmed.*

JOHN BORROWSCALE & another *vs.* ROYAL BOSWORTH & another.

A cargo of coal was ordered from a mining corporation directly through its treasurer, and was shipped in the name of the corporation directly to the buyers as consignees. At the time of receiving the order, the treasurer told the buyers that certain parties were the selling agents of the corporation, of which fact the buyers had other information also; and he afterwards told the agents that he had obtained the order for them. The bill of lading of the coal was forwarded through the hands of the agents, who sent it to the buyers with a bill for the price of the coal as due to themselves, which bill the buyers did not return for ten days; and, on receiving the bill of lading, the agents insured the coal in their own name, and, according to their usual course of business in sales made by themselves, credited the corporation with the price of it, and charged the corporation with a guaranty commission. *Held*, that the agents could not maintain in their own name an action for the price of the coal.

CONTRACT on an account charging the defendants, Royal Bosworth and Edward S. Hamlin, partners under the firm of Bosworth & Hamlin, with the price of a cargo of coal, and crediting them with a less amount received by the plaintiffs, John Borrowscale and Joseph W. Gregg, partners under the firm of John Borrowscale & Co., from a sale of the coal after

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the defendants refused to receive it. The answer denied the making of any contract with the plaintiffs; and set up the statute of frauds.

At the trial in the superior court, before *Ames*, C. J., it appeared that the plaintiffs, whose place of business was in Boston, were agents for the sale of the coal of the St. Clair Mining Company, "having the exclusive sale of that corporation's coal for all places east of Rhode Island," their course of business being "to receive orders, transmit them to Philadelphia, and cause the coal so ordered to be forwarded by sea, to be unloaded from the vessel on the premises of the purchaser," for which "they charged commissions to their principals, and they guaranteed all sales made here."

Charles E. Page, the treasurer of the St. Clair Mining Company, testified that in March 1865 at an interview with the defendants, who were dealers in coal, at their wharf in Boston, they proposed to buy a cargo of "the coal," and he said that he would take their order, and it was arranged that a cargo should be sent to them in a vessel "drawing not more than eleven feet of water, and, if convenient or practicable, having not over twenty-eight feet breadth of beam;" that he told the defendants that the plaintiffs were the selling agents of the company; that before he left Boston he gave the plaintiffs notice that he had obtained this order for them; and that, on arriving at Philadelphia, not being able to find a vessel of so narrow beam as twenty-eight feet, he loaded a cargo on the schooner Alderdice, which drew less than eleven feet of water but was twenty-nine feet and one inch wide in the beam.

The plaintiff Gregg testified that the plaintiffs on March 15 received by mail from Philadelphia the bill of lading of the coal thus shipped, expressed therein as "shipped by the St. Clair Coal Company" consigned "to Bosworth & Hamlin;" and made out a bill of the coal against the defendants, beginning thus: "Bosworth & Hamlin, Bought of John Borrowscale & Co., Commission Coal Merchants, St. Clair Co.'s Rainbow Coal;" and left both at the defendants' counting-room on the same day; that he knew that "there had been a contract," but

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"the bill of lading gave him the first knowledge he had of the shipment;" that on receiving the bill of lading the plaintiffs credited on their books "the amount of the sale" to the St. Clair Mining Company, and had since accounted for it "as sold and guaranteed by them;" and that on March 25, before the arrival of the schooner in port, the defendant Hamlin brought both bills back to the plaintiffs, saying that the vessel was too large to go into the defendants' dock, and the plaintiffs "refused to take back the bills," and offered to substitute a smaller vessel and cargo at the same rate, but Hamlin refused the offer, and went away, leaving the bills.

The plaintiff Borrowscale testified "that one of the defendants had been told that the plaintiffs were the selling agents, and had informed him that the defendants had ordered a cargo from the company;" that he was present at the interview with Hamlin on March 25, which was substantially as described by Gregg; and "that the coal was insured in an open policy in the name of the plaintiffs after the plaintiffs received the bill of lading." And Charles F. Rand testified that he was in the plaintiffs' counting-room at the time of the interview on March 25; confirmed Gregg's account of it; and added that Gregg asked Hamlin why he did not return "the bill" earlier, if he did not mean to receive the coal.

It appeared in evidence that the vessel arrived at Boston on March 27, and was moored at or near the wharf of the defendants; that the master repeatedly offered to unload the coal, but the defendants refused to receive it; and that after a delay of three days the vessel was hauled to another wharf, where the coal was then sold by the plaintiffs. There was also evidence tending to show that, as the vessel was moored at or near the defendants' wharf, it would have been impossible for the coal to have been discharged on their premises; but the same witnesses, on cross-examination, testified, as matter of opinion, that the vessel could have been moored further up the dock, and discharged at one of the regular berths at the wharf.

The defendant Hamlin testified that the contract of the defendants was "wholly with Page," and that it was distinctly

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agreed that the shipment was to be made in a vessel of not more than twenty-eight feet breadth of beam; that the defendants "did not know that the plaintiffs had anything to do with the contract, and their names were not mentioned in it;" that two days after the bill of lading came he told the plaintiff Borrowscale that the stevedore said that he could not get the vessel to the defendants' wharf, and Borrowscale said that he would put that cargo elsewhere and get them another one; and that, "finding that Borrowscale did nothing about it," he "returned the bill of lading on March 25, and it was accepted by the plaintiffs." But Borrowscale, being recalled by the plaintiffs, denied that he ever had any conversation with Hamlin between March 15 and March 25.

The defendants contended that, on all the testimony, "there was no proof, as matter of law, of a contract between the plaintiffs and the defendants; and also that there was, as matter of law, no proof of such a delivery and acceptance of the coal as to satisfy the statute of frauds." And the judge ruled that the plaintiffs were not entitled to recover; directed a verdict for the defendants; and reported the case for the revision of this court.

W. Gaston & J. M. Keith, for the plaintiffs.

F. A. Brooks, for the defendants.

Hoar, J. The question whether the oral contract for the sale of this cargo was upon the condition that it should be shipped in a vessel which could discharge at the defendants' wharf should have been submitted to the jury, if it was material to the decision of the case, because the evidence upon it was conflicting. The further question, whether the lapse of time between the receipt of the bill of lading by the defendants and their sending it back to the plaintiffs, in connection with the other circumstances of the case, showed an intention on the part of the defendants to assume the ownership of the cargo, so that there was an acceptance of the bill of lading, and thereby an acceptance of the cargo, was also a question of fact upon which the verdict of a jury was necessary. *Morton* v. *Tibbett*, 15 Q. B. 428. *Bushel* v. *Wheeler*, Ib. 442.

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But there is a more substantial objection to the maintenance of the action, in the want of sufficient evidence to prove that, if the defendants made a valid contract with any one, they made it with the plaintiffs. The defendants ordered the cargo of coal from the St. Clair Mining Company, through Mr. Page, the treasurer of the company. The bill of lading was made from the mining company as shippers, directly to the defendants as consignees. If there was an acceptance of the bill of lading, as a delivery of the coal, it was therefore an acceptance of a transfer of the coal directly from the company to them. The bill of lading was not made to the plaintiffs, and indorsed by them to the defendants. It was merely sent to the defendants through their hands, giving them no title to the property. The testimony that the treasurer of the company told the defendants that the plaintiffs were their selling agents, and that the defendants knew the fact, does not tend to prove that the defendants agreed to contract with the plaintiffs. They had made the contract with the company through another agent, and told the plaintiffs that they had ordered a cargo from the company. That the plaintiffs credited the company with the cargo, charged a guaranty commission, and effected insurance upon it, were all *res inter alios*, to which the defendants were not a party. The statement of the treasurer to the plaintiffs, that he had got this order for them, was not made until after the defendants had made the bargain with the company through him; the defendants were not privy to it, and never assented to the substitution. The bill for the coal, which was made out in the plaintiffs' name, and delivered with the bill of lading, was not in pursuance of any contract which the defendants had made, and gave the defendants no title. They did not return it, but it was not of any value, and the evidence did not show that they assented to it, or ever claimed any rights under it. The treasurer had no authority from the plaintiffs to act for them, at the time when he made the bargain on behalf of the company with the defendants.

Under these circumstances, we know of no authority for the doctrine that the mere right to sue can be transferred, without

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the act and assent of both parties to the contract. A principal may sue, where the contract is made through an agent; because he is the party in interest, and the consideration moves from him, although the other party may have supposed that he was dealing with the agent only. An agent may sue upon a promise made directly to him, although the principal might also sue upon the same contract. But here the plaintiffs were neither the owners of the property, nor was the title to it ever transferred to them, nor did the defendants make them any promise. The defendants ordered the coal from the company, and their promise, express or implied, was to the company, and not transferable without their consent.

Judgment for the defendants on the verdict.

EMELINE J. MORRILL *vs.* EDWARD DE LA GRANJA.
SAME *vs.* SAME & others.
LOUISA J. MORRILL *vs.* SAME & another.

The owner of a house leased it for a year on condition that the lessee should pay rent monthly in advance, board him and his family at her expense, and board his servant at a rate to be agreed. Upon his demand for payment of rent for the second month of the term, when due, she asked for "allowances," first for boarding his servant, next his visitors, and finally himself and his family, each of which he refused to make. On his refusal, she refused to pay rent or furnish board, and sued him on an account for board furnished for him and his family, as well as for his servant and visitors. While this action was pending, he peaceably dispossessed her of the house; and she sued him thereupon in trespass. In these actions, tried together, *Held*, that she might recover the value of the board of his servant and visitors; but that he was warranted in so dispossessing her for breach of the condition of the lease.

THREE ACTIONS tried together. The first was of contract on an account for board of the defendant and his wife from May 11, 1866, to June 8, 1866, $80; for board of the defendant's servant four weeks, $12; and for board of four friends of the defendant two weeks at his request, $120. The dates of furnishing the board charged in the two last items were not specified. Writ dated June 20, 1866. The second action was of tort in the

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nature of trespass *quare clausum fregit*, for eviction of the plaintiff from a house on Temple Street in Boston. Writ dated June 23, 1866. The third, also of tort, was for assault and battery of the plaintiff, and conversion of her trunks and clothing. Writ dated June 25, 1866. The parties joined with De la Granja as defendants in the second and third actions were his assistants in the alleged eviction and assault.

The answer in the action of contract was a general denial of the plaintiff's claim; in the first action of tort was a justification of the eviction on the ground of the defendant De la Granja's lawful possession of the house at the time; and in the second action of tort was a denial of any conversion of property, and an averment that any violence used by the defendants was in self-defence.

In the superior court, *Brigham*, J., allowed a bill of exceptions in which the defendant De la Granja's offer of proof was stated in substance as follows; but which contained no statement of any proofs of the plaintiffs.

"At the trial, the defendant rested his defence upon the following facts which he offered to prove:" In conformity with an agreement between himself and the plaintiff Emeline, they on May 9, 1866, signed an indenture, by which he let to her, for one year from that date, his furnished house on Temple Street in Boston, (excepting certain rooms, reserved for his own occupation,) on condition that she should pay a rent of $1200, in instalments of $100 each "on the first day of every successive month from the day of the date hereof, this above mentioned day being the first day of the first month for the purposes of said payment," and also on condition that she should keep all her other covenants; and she covenanted to pay rent in conformity with the terms of the condition quoted, and "at her own proper charge and expense to board the said lessor, together with his own immediate family, and to board one domestic servant in his, the said lessor's service and employ, at such reasonable rate as the parties to this instrument shall hereafter agree." And at the time of taking this lease she paid to the lessor $100 for one month's rent.

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"At the end of the first month of said Emeline's occupation of said house, the defendant demanded of her payment of the ensuing month's rent in advance, which said Emeline refused to pay unless the defendant would make an allowance to her for the board of friends of the defendant, who had visited him and his family and been boarded by her for the period of two weeks. The defendant refused to make this allowance, and ordered her to quit the premises. Subsequently said Emeline demanded of the defendant an allowance for board of his servant; and at another time, subsequently to the demand of payment for board of his servant, she demanded of him an allowance for board of him, his wife and infant child. And upon the defendant's refusal to make the several payments or allowances demanded of him, for the board of his visitors, his servant, himself, his wife and infant child, said Emeline refused either to pay him any rent or to furnish board to him or any one of his family. Thereupon the defendant, on June 23, 1866, dispossessed said Emeline of, and ejected her daughter Louisa J. Morrill from, the said house, together with their effects, after giving notice to them several days previously of his intention so to do, and after their promises and failures to leave said house, and after repeated demands upon said Emeline to pay rent and furnish board to the defendant and his family. In dispossessing said Emeline of, and ejecting Louisa from, said house, with their property, no force unreasonable in kind or degree was used." "On June 20, 1866, the action of Emeline for board was brought, and an attachment of property made thereupon."

The judge ruled "that the facts of which the defendant offered evidence would not in view of the terms of the lease justify or authorize his dispossessing Emeline, or the ejection of her daughter Louisa, or the removal of their property from said house in any manner. Thereupon the defendant [De la Granja] submitted to a verdict in favor of the plaintiff," and alleged exceptions, "and filed his agreement, that if these exceptions are not sustained damages may be assessed against him in the superior court in each of these actions."

F. F. Heard, for De la Granja.

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T. H. Sweetser & J. L. Newton, for the plaintiffs.

Colt, J. These three actions, which were tried together, grow out of the relations of the parties under a written lease from the defendant to said Emeline, dated May 9, 1866, of his house and furniture for one year, subject to the condition that she should pay rent therefor in the manner therein provided, and perform all her agreements therein contained. The rent was payable monthly in advance, on the first day of each successive month. And the lessee further agreed at her own proper charge and expense to board the lessor, together with his own immediate family; and to board one domestic servant in his, the lessor's, employ, at such reasonable rate as the parties should thereafter agree upon.

The defendant offered to prove, in defence of all the actions, that the first month's rent was paid in money in advance, and at the end of that month he demanded the rent for the ensuing month. Payment was at first refused unless allowances were made for the board of certain visitors in his family; and again refused unless the defendant would allow for board of his servant; and finally, unless the board of himself, and his wife and infant child, was allowed, in payment of rent. These several allowances the defendant refused to make, and the plaintiff refused to pay rent or board him or any of his family.

While the defendant and said Emeline maintained this attitude, namely, June 20, 1866, she brought the first of the above actions, in contract, to recover on an account annexed the three items, of board of the defendant and his wife, of the defendant's servant, and of his four friends and visitors. And in this case we are of opinion that, by the true construction of the lease, the plaintiff agreed to board the defendant and his wife at her own charge and expense. This stipulation seems to have entered into the consideration for the lease, and no recovery can be had upon the item. Under the next small item for board of the servant, upon the pleadings as they stand, no application thereof having been made or being now asked upon the rent due to the defendant, the plaintiff, for anything that appears, would be entitled to recover a reasonable compensation. And upon

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the last item the plaintiff would of course recover a reasonable compensation, if the evidence should justify a finding that the defendant undertook and promised to be responsible for the board of his friends and visitors. In this case, therefore, judgment must be for the plaintiff; damages to be assessed by the superior court according to the agreement of the parties.

In reference to the other case in favor of said Emeline, the defendant offered to prove that, after having repeatedly demanded payment of rent and board for himself and family, which she refused to pay or furnish, and after the commencement of the first suit, in which his property was attached, to wit, on the 23d of June, he entered and dispossessed the said Emeline, and ejected said Louisa from his house, using no force unreasonable in kind or degree. This action in tort was afterwards on the same day commenced. Upon the terms of the lease and the facts offered to be shown, we are of opinion that the defendant was justified in so peaceably dispossessing the plaintiff. The rent was due and unpaid. It had been demanded, as well as the board agreed to be furnished; and both were refused. The payment was indeed withheld by the plaintiff on the claim that certain allowances should be made her for board; but it does not appear from the case that the sum which the plaintiff was legally entitled to for board was sufficient to meet the whole rent then due. If at law, and without the interference of a court of equity, the plaintiff could avoid a forfeiture by showing that the defendant was indebted to her, under the terms of the lease or otherwise, in a larger amount than the rent due, the case as presented does not show that fact. The verdict in the plaintiff's action of contract was submitted to, it would seem, upon the agreement that the question of the amount to be recovered in each case should in any event be again open to him in the superior court. And a finding in that action of an amount due from the defendant on the day of its commencement, June 20, exceeding the rent then due him, would not alone prove that there was that amount due for board on June 1, the day the rent fell due. The use of the word "allowance" implies that she expected to apply it only in part payment; and

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it was her duty, if she would escape the forfeiture which the lease provided, to have paid or tendered the balance due after applying the board.

If the counter claims of the plaintiff arising under the provisions of the lease were sufficient to balance the claim for rent, it may be that the lessor could not insist upon a forfeiture. The right to apply them by way of satisfaction or set-off could not be disputed. But here the principal item in the plaintiff's account arises entirely outside of the lease; and no evidence was offered to support it. And besides, before the entry of the defendant, she had commenced an independent suit and attached his property to recover the amount of her account, no longer seeking to apply it on the rent.

In the last action of Emeline, and in the case of Louisa, to which the same reasoning applies, therefore the entry must be

Exceptions sustained.

THOMAS S. NEGUS & another *vs.* MICHAEL H. SIMPSON.

A written contract for supplies for a vessel for which the master has authority to bind the owners is binding on them if such appears to be the intention as gathered from the whole instrument, although signed by him in his own name only.

The authority of the master of a vessel to bind the owners by a contract in a foreign port for the necessary supply of a chronometer for her includes authority to obtain a chronometer by hiring with an option of purchase.

The ports of the several states of the United States are to each other foreign ports, as regards the authority of masters of vessels lying therein to pledge the credit of the owners for supplies necessary for their vessels.

No demand or notice is necessary before bringing an action on a contract after the expiration of a definite time which by the terms of the contract was fixed for its performance.

In an action for the value and hire of a chronometer delivered five years previously, on hire, to the master of a vessel, under a contract to return it at the end of a voyage from New York to Callao and back, on which the vessel was then bound, or within fourteen months, but with an option of purchasing it within six months from the date of delivery, the objections that there was no evidence at the trial that the voyage had come to an end or that the option of purchase had not been exercised, neither of which issues was specially made in the pleadings, are not open to the defendant at the argument of a bill of exceptions in which no question of law is raised in regard to them and the evidence thereon, if any, is not reported.

The material part of a contract, made by the master, and binding on the owners, of a ves-

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sel bound on a certain voyage, was thus: "Received of N. & Co., on account of vessel and owners, a chronometer, Name N., No. 1166, Value $240, on hire," "at the rate of six dollars per month until the said chronometer shall be returned to them," "to be returned" "at the expiration of the present voyage, or within fourteen months from the date hereof, in the same good order as received." The master "has the privilege of buying this chronometer within six months from date for $240 cash." In an action by N. & Co. against the owners of the vessel for failing to return the chronometer as stipulated, *Held*, that the measure of damages was the stipulated hire of the chronometer for fourteen months, with its value at the end of that time, and with interest from that time on the whole amount so ascertained; and that the recital of a value in the contract was not conclusive as to the value, although proper to be considered by the jury in assessing the same.

CONTRACT for the value and hire of a chronometer. Writ dated December 15, 1866. The principal count of the declaration was as follows: "And the plaintiffs say that the defendant made a certain contract in writing with the plaintiffs, a copy of which is as follows, namely: 'New York, November 20, 1861. Received of T. S. Negus & Co., on account of vessel and owners, a chronometer, Name Negus, No. 1166, Value two hundred and forty dollars, on hire, for the use of which we jointly and severally promise to pay to them at and after the rate of six dollars per month until the said chronometer shall be returned to them, or until they shall be served with a protest of the loss, if any, of the same. The said chronometer is to be used on board the good and seaworthy ship called the Rose Standish, whereof H. D. Hutchings is master, and bound for Callao and back to New York, and is to be returned to the said T. S. Negus & Co., without expense to them and without charge or claim for salvage and general average, at the expiration of the present voyage, or within fourteen months from the date hereof, in the same good order as received. Insured by T. S. Negus & Co. against unavoidable damage or total loss by fire or water, at sea: all and every other risk or risks whatever are taken by the undersigned. Captain Hutchings has the privilege of buying this chronometer within six months from date for $240 cash, without charge for hire, but is to pay insurance $6 per six months, rate of $1 per month. H. D. Hutchings, Master Ship Rose Standish.' And the plaintiffs further say that the defendant was on said 20th of November 1861 owner of said ship called the Rose Standish, and that the said H. D. Hutchings was then and there

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master of said ship and agent of the defendant; that said ship was not then in her home port; that said chronometer was reasonably fit and proper for said ship for use in her navigation; that said chronometer was on said 20th of November delivered to said ship, and has not been returned to the plaintiffs, and they have not been served with a protest of the loss, if any, of the same. And the defendant owes the plaintiffs the value of said chronometer as stated in said written contract, and hire for the use of the said chronometer from said 20th day of November 1861 to the date of the writ in this action." There was also a count on an account annexed for the value of a chronometer, $240, and for the hire of it from November 20, 1861, to the date of the writ, at $6 per month. The answer was a general denial of the plaintiffs' claim; with special allegations that at the time of the alleged contract the vessel was already provided with a suitable chronometer, and that her master had no authority to bind the owners by such a contract.

At the trial in the superior court, before *Wilkinson*, J., the plaintiffs, who were dealers in chronometers, doing business in New York City under the firm of T. S. Negus & Co., introduced evidence tending to show that in November 1861 the ship Rose Standish, which was registered in the port of Boston and owned by the defendant, who resided in Massachusetts, was in the port of New York, bound on a voyage to Callao, when her master received from the plaintiffs the chronometer in question and executed the writing above set forth; that the ship sailed on her said voyage; that the chronometer had never been returned to the plaintiffs; and that no protest of the loss of it had been served upon them. "The defendant introduced no evidence to show what had become of the chronometer, or how long it had been used by the vessel. It also appeared in evidence that the vessel had a chronometer on board, belonging to the defendant, when the plaintiffs' chronometer was hired. The plaintiffs then introduced evidence tending to show that the defendant's chronometer was an old one, and did not keep accurate time, and could not be relied on to perform the service for which a chronometer was used on a vessel; and that two good

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chronometers were reasonably fit and proper for a vessel on such a voyage, for use in her navigation. There was no evidence of a demand prior to bringing the suit."

"The defendant contended and asked the judge to rule that the contract was the personal contract of the master, and if not, that the master had no authority to make such a contract to bind him without notice, and without some other authority than his position as master gave him; that the port of New York was not a foreign port, so as to give the master greater authority than he would have in the port of Boston to bind his owner; that, as the vessel had already a chronometer on board, which was known to the plaintiffs, the master could not hire another so as to bind him; that, if the master had authority to bind him by purchase, yet he could not make this contract for hire so as to bind him; that on the declaration the plaintiffs could not recover for anything but the hire; that they could not recover the value of the chronometer, and in no event could they recover until a demand had been made on the defendant; that, if they could recover at all for the value of the chronometer under the contract, they could recover only the value without the hire; and that at all events the damages should not exceed $240, with the interest and insurance."

But the judge declined so to rule; and instructed the jury "that the master of a Boston vessel, appointed by the owner, and sailing the ship on account of the owner, has authority in New York to procure for the vessel, and to bind the owner thereby, whatever is necessary for the vessel in her navigation, having regard to the voyage on which the vessel is about to sail, without notifying the owner; that, if the plaintiffs' chronometer was necessary for the safe navigation of the defendant's vessel, the master had authority to hire it, and bind the defendant, whether such necessity was caused by the chronometer which the vessel had being insufficient, or by two chronometers being necessary on such a voyage; and that the jury were to determine whether two chronometers were necessary on such a voyage, and, if only one was necessary, whether that which the vessel already had was a suitable chronometer; that the con-

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tract in this case was not the personal contract of the master, but was made by him in behalf of the defendant, and that the defendant was liable under it, if the jury found that the chronometer was necessary; that, as there was no evidence that the master or the defendant had elected to purchase the chronometer under the contract, the plaintiffs were not restricted to the value of the chronometer with interest and insurance; and that, if the jury found for the plaintiffs, the measure of damages was the value of the chronometer as stated in the contract, $240, with hire for fourteen months, and interest on these two sums from the date of the writ."

The plaintiffs then asked for a further instruction "that they were entitled to interest on the two sums mentioned (namely, the value, and the fourteen months' hire) from the expiration of the fourteen months; but the judge declined so to rule.

The jury returned a verdict for the plaintiffs; and assessed damages in conformity with the instructions; and both the defendant and the plaintiffs alleged exceptions, the latter as to the rule of damages only.

W. Brigham, for the defendant.

J. Lathrop, for the plaintiffs.

Colt, J. The form in which the contract with the plaintiffs is drawn and subscribed in this case does not make it the personal obligation of the master alone. In writings of this description, the intention as gathered from the whole instrument controls. They are not governed by the strict rule, applicable only to sealed instruments and negotiable paper, which requires the signature to be in the name of the principal. Met. Con. 106. *Barlow* v. *Congregational Society in Lee*, 8 Allen, 460.

The authority of the master in a foreign port to make such a contract is well established, if the article procured is reasonably necessary and proper, having regard to the condition of the ship and the voyage on which she is bound. Under the instructions of the court, the jury must have found that the chronometer was necessary, either because the one which the vessel then had was imperfect, or because two were necessary on such a voyage. The authority to supply the ship by purchase implies the power

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to obtain by hiring with an option to purchase. Such contracts were recognized as binding upon the owner in *Bliss* v. *Ropes*, 9 Allen, 339, and *Bond* v. *McKinnon*, Ib. 344. The ports of the several states of the Union are as to each other to be regarded, in questions like this, as foreign ports. *Stearns* v. *Doe*, 12 Gray, 485.

We do not see that the declaration restricts the plaintiffs from recovering in this action all the damages which the breach of contract proved entitles them to. Nor was a demand necessary before bringing the action. When by the terms a definite time is fixed for the performance of a contract, no demand or notice is necessary before bringing an action.

The point first made at the hearing, that there was no evidence that the voyage to Callao was yet ended, comes too late. It is not raised by the pleadings, and does not appear to have been questioned at the trial. No question of law is raised by the exceptions in regard to it; and the evidence in reference to it, if any, is therefore not reported. So in reference to the ground, now first taken, that the right to purchase under the contract may have been exercised, and that the burden is upon the plaintiff to show that such right was not exercised, it is sufficient to say that this objection is not now open to the defendant.

The more important question arises upon the rule of damages given. The contract was an agreement to hire at a certain fixed rent for a period which was to end, at the option of the hirer, at the end of the contemplated voyage, or at the expiration of fourteen months. The chronometer was then to be returned to the plaintiffs. The article was not returned as stipulated; and, if this were all, it is plain that the plaintiffs would be entitled to recover the rent agreed for the whole period of fourteen months, and whatever the jury might find the value to be at the expiration of that time. That value would of course be affected by the consideration that its original value had been diminished by the period of its use, or on the other hand increased by the enhanced market value of such articles. Under the peculiar terms of this contract, it is claimed that this rule cannot prevail,

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because the contract states the value of the article to be $240, and requires that it shall be returned in the same good order as received. Upon the whole, we do not regard these provisions as intended by the parties to be conclusive between them upon the value of the article. In a subsequent clause, the right of the master to purchase within six months at that price is given. And the value seems to be named either in reference to that right of purchase or as mere matter of description. The agreement that it shall be returned in the same good order does not provide against that deterioration which comes from ordinary use and wear. In order to give the recital of value the conclusive character contended for, it must appear from the whole contract that the parties intended to liquidate the damages. Such interpretation will not be given unless the clear intention and the subject matter require it; and is never favored by the courts. *Fisk* v. *Gray*, 11 Allen, 132. 2 Greenl. Ev. §§ 257–259. Such sums named are rather to be treated as penalties, so as to open the inquiry as to the actual damage suffered. It is proper, however, for the jury to take into consideration whatever evidence is afforded by the contract itself by way of admission of value by the parties, and to that extent the recital is material.

As to the allowance of interest on the value of the chronometer, while it is true that it is not to be allowed in the sense in which it is added in contracts for the payment of money, yet as a measure of damages it is proper for the jury to add it. 3 Parsons on Contracts, (5th ed.) 105, note. Sedgwick on Damages, 380.

The instructions of the learned judge in the matter of damages are alone erroneous. The plaintiffs are entitled to recover the stipulated hire of the chronometer for the fourteen months, with the value of the instrument at the expiration of that period, and interest on the whole amount so ascertained from the same time. Upon a contract of this description, upon a failure to return the property at the stipulated time, with no suggestion of special damage, interest on the value of the property from the time it was agreed to be delivered is a reasonable measure of damage for its detention.

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All the other questions having been settled by the jury under rulings to which no exception can be taken, the new trial must be confined to the assessment of damages alone according to the rule here given.

Exceptions of both plaintiffs and defendant sustained; and a new trial ordered on the question of damages only.

CHARLES E. PAIGE *vs.* JOHN G. SMITH & others.

Receivers running a railroad under appointment of a court of chancery in another state, who act as common carriers and are there held liable as such to actions at law, may be sued as common carriers in this Commonwealth.

CONTRACT for the value of fifty-five bales of hay. In the superior court facts were agreed in substance as follows: "The defendants were originally trustees of the Vermont Central Railroad, under the first mortgage bonds; and they were, prior to the year 1861, operating the Vermont Central Railroad under a possession taken under said bonds, and the Vermont and Canada Railroad under a lease, or supposed lease. A controversy arose between the Vermont and Canada, and the Vermont Central Railroad Companies, as to which of them should have a right to operate the road; a bill in equity was filed in the court of chancery in the state of Vermont; and during the pendency of said bill receivers were appointed by the court to operate said roads, and, at the time of the occurrence of the matters in controversy in this suit, the defendants were operating both of said roads, under the decree." "Prior to February 20, 1864, the plaintiff made a contract with the defendants, acting as receivers aforesaid, through their agent, for the transportation of hay, over said roads and other roads, to Boston; the terms of which contract are in dispute, and are to be shown by the plaintiff, and the defendants may also offer evidence in relation thereto. Under said contract the defendants furnished a platform car for the transportion of hay," "and Reynoulds, Soule & Co., on February

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20, 1864, having sold hay to the plaintiff, shipped on said car on the Vermont and Canada Railroad, for the plaintiff, fifty-five bales of the plaintiff's hay," of a value which was agreed. "Said car with said hay was, within one or two days afterwards, on its passage to Boston, and, while on the Vermont and Canada Railroad, operated by the defendants as receivers as aforesaid, burned and destroyed by fire. Either party being at liberty to prove any facts tending to show negligence or care in regard to the loss of said hay."

At the trial, before *Wilkinson*, J., before the plaintiff called any witnesses, the judge, at the defendants' request, ruled that on the agreed facts the plaintiff could not recover, and directed a verdict for the defendants. The plaintiff alleged exceptions.

T. S. Harlow, for the plaintiff.

A. A. Ranney & J. F. Colby, for the defendants.

Foster, J. The supreme court of Vermont, in an action against these defendants, held that, "if in fact they were common carriers over a line of railroad, it could be no defence to an action at law for a breach of duty or obligation arising out of business entrusted to them in that relation, that they were running and managing the line of railroad as receivers under the appointment of the court of chancery." *Blumenthal* v. *Brainerd*, 38 Verm. 408.

It is impossible for the courts of this Commonwealth to accord to these defendants an exemption from the ordinary common law liabilities of common carriers, more extensive than they are allowed in the state in which they were appointed receivers, and in which the accident occurred. Under these circumstances, the ordinary rule for which the defendants contend, that receivers are amenable solely to the court by which they are appointed, is inapplicable. *Exceptions sustained.*

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Robert Wright *vs.* James Tetlow & another.

The delivery of the mortgaged chattels to the mortgagee, required by the Gen. Sts. *c.* 151, § 1, to render valid against third persons an unrecorded mortgage, is such a delivery as would be necessary in case of an absolute sale of those chattels.

As against the title of a third person to chattels embraced in an unrecorded mortgage, it is sufficient, under the Gen. Sts. *c.* 151, § 1, if they are delivered to the mortgagee before, and actually retained by him until, the accruing of such title.

On a trial of the title of a mortgagee to two unfinished steam-engines as against an attaching creditor of the mortgagor, there was evidence in behalf of the mortgagee tending to show that, at the time of executing the mortgage, (which was never recorded,) the mortgagor went with him through the workshop where the mortgaged property, consisting of numerous pieces, some of them of great bulk and weight, were scattered in different rooms, and showed him the various pieces, for the purpose of formally delivering them to him; that the mortgagor's clerk gave him a receipt for the mortgaged property, in which the clerk agreed to hold it for him, and to deliver it to him on demand, without any expense of storage or keeping; that, pursuant to an arrangement with the mortgagee, the mortgagor continued to work on the engines and had nearly finished them when he became insolvent; that during all this time there was no access to the shop except through the counting-room, (where the clerk was in the daytime, except on Sundays,) or through a gate which was fastened inside and was in full view from the counting-room; that, every night the clerk left the premises in charge of a watchman employed and paid by the mortgagor, and on Sundays locked them up; that, when the messenger came to take possession of the property of the mortgagor under a warrant in insolvency, the clerk told him that he was keeping the engines for the mortgagee, and accepted from him a deputation as keeper of all the property of the mortgagor, without any schedule thereof, supposing that the messenger took or could hold only the other property in the shop; and that the clerk continued to hold the engines until they were taken by an officer on a writ of replevin in favor of the creditor of the mortgagor against the messenger, and then became keeper under the officer until the latter delivered the engines to the creditor. There was contradictory evidence, in behalf of the creditor, on some points; and, among others, whether the deputation of the clerk as keeper under the messenger included the engines. And there was evidence in behalf of the creditor tending to show that, when the officer came to take the engines on his writ, the clerk refused to surrender them without an order from the messenger. The judge refused to rule that the clerk, by giving up the engines to the officer, and afterwards becoming keeper under the officer, ceased to retain them for the mortgagee as required by law; or that, if the clerk surrendered them to the officer upon an order from the messenger, there was not such a retaining of possession; or that such retaining ceased when the clerk became keeper under the messenger; or that on all the evidence there was no such taking and retaining of possession by the mortgagee as to entitle him to the engines; but submitted that question to the jury, with instructions that, if the clerk became a keeper for the officer and held for him without making any claim or giving notice of any claim in behalf of the mortgagee, and only insisting that he would not allow the engines to go into the officer's hands except on the messenger's order, it would be evidence tending to show that the clerk was not then keeping them for the mortgagee; and that, in order to return a verdict for the mortgagee, they must find that he had an actual possession of the engines, which was not purposely

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kept secret; under which they were kept secured as such property should be secured under ordinary circumstances; to which the possession of the mortgagor for the purpose of finishing them was subordinate; which began before and continued when the messenger came to the shop to take possession of the property of the insolvent; and which the clerk never knowingly or actually surrendered to the messenger, making no claim and giving notice of none in behalf of the mortgagee; and that if the clerk, as agent of the mortgagor and in his behalf, was in actual possession of the engines at and just before the coming of the messenger, any previous remissness on his part would be unimportant. *Held*, that the attaching creditor had no ground of exception.

On a trial of the title of a mortgagee of chattels under an unrecorded mortgage, an instruction to the jury that, if the mortgagee took and maintained such possession of them as a deputy sheriff is required to keep in case of an attachment of like property, it would be sufficient to render the mortgage valid against a third person, is correct; and, if it does not appear that any explanations of the requirements of keeping by an attaching officer were asked for, there is no ground of exception to the judge's omission to give them.

On a trial of the issue whether there was such a delivery to the mortgagee, and retention by him, of chattels embraced in an unrecorded mortgage, as to render the mortgage valid against third persons, the admission in evidence of policies of insurance on the chattels, obtained by the mortgagor in favor of the mortgagee as part of the original transaction, is no ground of exception, if it does not appear that they were allowed any weight or effect upon the question of delivery.

A builder agreed with the United States to construct, under the superintendence of their inspectors, two steamboats, for a price certain percentages of which should be paid to him from time to time in a proportion to the progress of his work, and that the United States should have "a lien on the vessels and on all the materials provided for the fulfilment of this contract, for the money advanced or paid by the United States on account thereof." Afterwards he made a contract with a machinist for the latter to build the engines for these boats for a stipulated price for each engine when set up in the boat, and with a general understanding that he should make payments to the machinist on account of the work during its progress, but with no specification of the percentages or times of payment. As the work on the engines went on, the United States made payments to the builder, and the builder to the machinist, on account thereof. *Held*, that the latter contract did not transfer the property in the engines to the builder before their completion, nor the former contract divest the machinist of his property in them.

REPLEVIN of the materials composing the parts of two unfinished steam engines.

At the trial in the superior court, before *Ames*, C. J., it appeared that the defendant Tetlow on December 3, 1864, entered into a contract with the United States to build two iron tugboats, with all their steam machinery; in which it was stipulated that the work should be superintended by inspectors appointed by the United States, that certain percentages of the contract price should from time to time be paid by the United States to Tetlow, in a proportion to the progress of his work, and that the United States should have "a lien on the vessels,

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and on all the materials provided for the fulfilment of this contract, for the money advanced or paid by the United States on account thereof." It also appeared that Tetlow entered into a contract with Hepworth & Carr, who were machinists doing business at a workshop on Foundry Street in South Boston, to build the steam-engines for these boats, for the price of $20,000 for each engine when set up in the boat, and with a general understanding that Tetlow should make payments to Hepworth & Carr during the progress of their work, but without stipulating the sums of which such payments should consist, or fixing the times at which they should be made. There was evidence offered by the defendants tending to prove that on July 25, 1865, Tetlow had paid to Hepworth & Carr $27,000 under this contract, and that not more than three eighths of the labor on the engines had then been finished, nor more than $17,000 spent by Hepworth & Carr for such labor; but the plaintiff offered evidence which tended to prove, on the contrary, that an expenditure of not more than $8000 was then needful to complete the engines and set them in place on the boats. And the defendants also offered evidence that "the material for certain parts of said engines had been approved" by the inspectors, and "payments made thereon before July 25 to said Tetlow" by the United States, and that "insurance had been effected upon said engines for the benefit of the United States."

It further appeared that on July 25, 1865, Hepworth & Carr executed to the plaintiff a bill of sale of these engines as they then lay unfinished in the shop on Foundry Street, for a consideration named of $15,000; and, at the same time and as part of the same transaction, the plaintiff, for a nominal consideration, executed to Hepworth & Carr an instrument agreeing, upon payment by them to him of $15,000 at any time within two months from that date, to sell and convey to them the two engines, "the same to be at the risk and expense of the said Hepworth & Carr from this date, and, in case the same should be injured or spoiled by fire or otherwise, said Wright shall be required only to convey said engines in their then condition, upon the full payment of the sum of $15,000, after deducting

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any sum received for insurance;" and Seth A. Choate, a person in the employment of Hepworth & Carr, signed at the same time a receipt to Wright for the two engines, agreeing "to hold the same for said Wright, and to deliver the same to him, without any expense to him for storage or keeping, on demand."

The case otherwise is stated in the opinion. After a verdict for the plaintiff, the defendants alleged exceptions.

E. D. Sohier & C. A. Welch, for the defendants.

A. A. Ranney, (*N. Morse* with him,) for the plaintiff.

GRAY, J. We may assume, as contended by the defendants, and as being the most favorable view to them, that the instruments which passed between Hepworth & Carr and the plaintiff constituted a mortgage from them to him.

By the Gen. Sts. *c.* 151, § 1, a mortgage of personal property (except a ship or vessel, or goods at sea or abroad) is not valid against any person other than the parties thereto, unless it is recorded, "or the property mortgaged is delivered to and retained by the mortgagee." Before the passage of the St. of 1832, *c.* 157, of which this provision is a reënactment, possession was not necessary to give effect to a mortgage, made in good faith, even as against third persons. *Homes* v. *Crane*, 2 Pick. 607. The manifest intention of the legislature was, to require in the case of an unrecorded mortgage of chattels such delivery of possession as would be necessary in the case of an absolute sale, which need not be recorded. The nature of the possession must depend upon the bulk and character of the property. The possession of mortgaged chattels must indeed, by the statute, not only be delivered to, but retained by, the mortgagee; but it is sufficient if it be delivered before and actually retained until the accruing of any title which is set up by a third person in opposition to the mortgage. *Mitchell* v. *Black*, 6 Gray, 106.

The property in this case consisted of the parts of two unfinished steam-engines in the workshop of the mortgagors. These parts were very numerous, some of them of great bulk and weight, and were scattered in different rooms of the shop. At the time of executing the mortgage, and for the purpose of a formal delivery of the property, one of the mortgagors went

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through the shop with the plaintiff, and showed him the various parts and pieces of the engines; Choate, who was employed by the mortgagors as bookkeeper and paymaster and to keep the time of their workmen and attend to such of their business out of doors as he might be directed to attend to, signed and gave to the plaintiff a receipt for the engines and all the parts and pieces thereof, agreeing to hold the same for him and to deliver them to him on demand, without any expense of storage or keeping; and it was arranged and understood between the parties that the mortgagors should go on and finish the engines. The workmen accordingly continued to work on the different parts under the direction of the mortgagors as they had done previously. And no directions were given to keep the transaction secret. There was evidence tending to show that there was no access to the premises except through the counting-room in which Choate was, or the front gate which was fastened on the inside and was in full view of the counting-room; that Choate left the premises from six in the evening to seven in the morning in charge of a watchman in the employ and pay of the mortgagors, and locked them up on Sundays; that the mortgagors became insolvent; that Choate told Bayley, the messenger who came to take possession of the property under a warrant in insolvency, that he was keeping the various parts of the engines for the plaintiff; and accepted a deputation from the messenger as keeper of all the property of Hepworth & Carr, without any schedule thereof, supposing however that the messenger took or could hold only the other property which belonged to Hepworth & Carr or which was attachable as their property; that Choate afterwards continued to hold the engines until Merrill, a deputy sheriff, came and took them on a writ of replevin in favor of Tetlow against Bayley; and that Choate was afterwards appointed keeper by Merrill, and continued to hold the property until Merrill delivered it to Tetlow.

If the conveyance from Hepworth & Carr had been an absolute one, this evidence would have warranted a jury in finding a sufficient delivery of possession to the plaintiff as against attaching creditors of articles like these; and the fact that the

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person having the custody of the property in behalf of the vendee was in the employ and pay of the vendors would not make the delivery and possession less effectual. *Carter* v. *Willard*, 19 Pick. 1. *Bullard* v. *Wait*, 16 Gray, 55.

The defendants indeed introduced contradictory testimony upon some points; but the question whether upon the whole evidence an actual delivery of possession was proved was a question for the jury under proper instructions. *Phelps* v. *Cutler*, 4 Gray, 137.

The presiding judge therefore rightly refused to rule that there was no such taking and retaining of possession of the engines by the plaintiff as to entitle him to maintain this action.

The instructions given were sufficiently favorable to the defendants. They required the jury to find that the plaintiff had actual, and not merely constructive possession; that he kept and secured the property as such property is under ordinary circumstances required to be secured; that the possession of Hepworth & Carr for the purpose of finishing the engines was subordinate to Choate's possession and merely for the purpose of increasing the value of the property; that his possession was not purposely kept secret or concealed; that it began before, and continued when, the messenger came to the premises to take possession; and that Choate, as the plaintiff's agent and in his behalf, at that time had the property in his effectual control and in his actual keeping and possession. The instruction that if Choate, as the plaintiff's agent and in his behalf, was in actual possession of the property at and just before that time, any previous remissness on his part would be unimportant, was open to no just objection. *Mitchell* v. *Black*, above cited. The request for an instruction that, even if the previous acts of Choate constituted such a retention of possession as was required by law, yet such retention in behalf of the plaintiff ceased by Choate's becoming the keeper under the messenger, was rightly refused. There was conflicting evidence upon the point whether his deputation as keeper included these engines; and the jury were expressly instructed that if he at that time knowingly or actually surrendered the property to the messenger, making no claim and

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giving no notice of claim on behalf of the plaintiff, it would be a failure of continuity of possession, which would be fatal to the plaintiff's title.

The rulings requested, that Choate, by giving up the property to Merrill when he claimed it upon a writ of replevin, and afterwards becoming a keeper of the property for him, ceased to retain it for the plaintiff as required by law; and that if (as Merrill testified) Choate surrendered it to Merrill upon an order from Bayley, then there was not such a retaining of possession in behalf of the plaintiff as was required by law; were rightly refused. If the deputy sheriff claimed the possession under the authority of the writ of replevin which he held, Choate's allowing him to take it into his own possession, and (after he had so taken it and thus wrongfully deprived the plaintiff of the possession previously kept in his behalf by Choate) agreeing to act as his keeper, was not necessarily an abandonment of the plaintiff's possession. The circumstances under which the sheriff took possession were rightly submitted to the jury as evidence bearing upon the character of Choate's possession; with an instruction that "if Choate became a keeper for Merrill and held for him, without making any claim or giving any notice of any on behalf of the plaintiff, and only insisting that he would not allow the property to go into Merrill's hands excepting on Bayley's order, it would be evidence tending to show that Choate was not keeping the property for the plaintiff and was not the plaintiff's agent at that time."

The instruction that it would be sufficient, if Choate took and maintained such possession as a deputy sheriff is required to keep in case of an attachment of like property, was correct. *Sanderson* v. *Edwards*, 16 Pick. 145, 146. *Shepherd* v. *Butterfield*, 4 Cush. 425. As it does not appear that the defendants asked for more particular explanations of the requirements of keeping by an attaching officer, they have no ground of exception to the omission to give them.

The policies of insurance on the property, obtained by Hepworth & Carr in favor of the plaintiff on the day of the execution of the instruments which passed between them, were part of the transaction between the parties; and the bill of excep-

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tions does not show that they were allowed any weight or effect upon the question of delivery. The defendants therefore have no ground of exception to their introduction.

The contract between Hepworth & Carr and Tetlow for the manufacture of the engines did not transfer the property in them to Tetlow before their completion. *Briggs* v. *Light Boat*, 7 Allen, 293, and cases cited. The contract between Tetlow and the United States did not divest Hepworth & Carr of their property in the engines, or deprive them of the power to mortgage them for a valuable consideration to the plaintiff. Neither these contracts nor the payments made under them can affect the plaintiff's rights as mortgagee. *Exceptions overruled.*

HENRY C. HUNT & others *vs.* EDMUND G. LUCAS.

No provision of the Constitution is violated by a statute that, in all actions at law in this court, or the superior court, a default shall be entered against any defendant on whom legal service has been made, unless he or some one in his behalf, within ten days from the return day of the writ, or on or before the last day of the term, when the same does not exceed ten days, or within such further reasonable time as the court for good cause shown may order, files an affidavit that he verily believes that the defendant has a substantial defence to the action on its merits and intends to bring the same to trial.

CONTRACT on a promissory note dated September 27, 1867, payable ten days after date to the order of the defendant, and by him signed and indorsed to the plaintiffs. Writ dated October 19, 1867.

In the superior court, the defendant filed the following motion: "And now the defendant comes and states that he has not filed an affidavit of merits because he is informed that in order to make such affidavit he must truly believe that he has a defence which he is able to establish, and which, when established, is legally sufficient to bar the plaintiffs' claim. He further states that he is not able to make oath that he believes he has such defence; but he wishes to bring said case to trial. He therefore moves that he may be allowed to file an answer, and to defend without such affidavit." This motion the court overruled; and, after ten days from the day of the return of the writ, ordered a

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default to be entered in the action for want of such an affidavit; and the defendant appealed to this court.

H. W. Bragg, for the plaintiffs.

N. St. J. Green, for the defendant. Section 45 * of the Gen. Sts. *c.* 129, is unconstitutional. It deprives the defendant of rights guaranteed by the Constitution. The oath required to be taken is, in substance, that the defendant is clear in his conscience that he has a defence which is substantial, or which will prevail, and which is not technical, but is upon the merits; that is, which goes to the subject matter in controversy between the parties. This is the plain meaning of the language of the statute; Dwarris on Statutes, 573, 578; and is the construction which has been put upon it by this court. *Clark* v. *Connecticut River Railroad Co.* 6 Gray, 363. *Claflin* v. *Thayer*, 13 Gray, 460. *Cole* v. *Ackerman*, 7 Gray, 40. *Hayden* v. *Attleborough*, Ib. 338.

By the Constitution, all men have certain inalienable rights, of which they can be lawfully deprived neither by legislators nor by courts. One of these is the right of protecting property. When that property is menaced by suit brought, every citizen has the right of protecting it in court without denial or needless hindrance; and can be deprived of it only in accordance with the settled course of judicial proceeding, and by the ultimate decision of the court upon the matter of law, and of the jury upon the matter of fact. The clauses of the Constitution giving these rights are to have a liberal construction. *Commonwealth* v. *Anthes*, 5 Gray, 222. *Jones* v. *Robbins*, 8 Gray, 340.

* "In all actions at law in the supreme judicial court, or superior court, the court shall, at any time after ten days from the return day of the writ, or as of course on the last day of the return term, enter a default against any defendant on whom legal service has been made, unless the defendant or some one in his behalf has filed within said ten days, or on or before the last day of said term when the same does not exceed ten days, an affidavit that he verily believes that the defendant has a substantial defence to the action on its merits, and intends to bring the same to trial: Provided, that upon good cause shown the time for filing such affidavit may be extended for such reasonable time as the court may order."

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A party's right to make defence is not to be measured by the extent of his belief in the truth or falsity, strength or weakness, of that defence. Independently of any question of defence, he has a right to appear in court, and to require the production of the plaintiff's proof, and the judgment of the court upon the effect and sufficiency of that proof. 2 Inst. 45, 50. *Jones* v. *Robbins*, 8 Gray, 342. *Denny* v. *Mattoon*, 2 Allen, 381, 382. *Taylor* v. *Porter*, 4 Hill, 146, 147. *Hoke* v. *Henderson*, 4 Dev. 15. *Den* v. *Singleton*, Martin, (No. Ca.) 49. *In re John & Cherry Streets*, 19 Wend. 676. *Wynehamer* v. *People*, 3 Kernan, 432, 433. *People* v. *Haws*, 37 Barb. 456. *Greene* v. *Briggs*, 1 Curtis C. C. 311. *Frothingham* v. *Dutton*, 2 Greenl. 255. *Plimpton* v. *Somerset*, 33 Verm. 283. The Constitution guards with equal care the citizen's right to life, to liberty, and to property. He can be deprived of neither without due proceedings in court, conducted according to the course of the common law, and with a jury if facts are in controversy. There is no distinction anywhere made between his right to life and liberty, and his right to property. There is the same, and no more, power in the legislature to require an affidavit of defence, subject to a default, in a civil case, that there is to require the same affidavit, subject to the same penalty, in a criminal case. A prisoner on arraignment, guilty though he be, has the right, without subjecting himself to the penalties of perjury, to plead not guilty, which, in legal signification, means that he calls upon the government to produce its proof. The defendant in a civil action has the same right, by the same plea of the general issue, having the same signification in a civil as in a criminal proceeding, to call upon the plaintiff to make out his case. It is a principle lying at the foundation of the common law system of judicial investigation, that a plaintiff must recover, if at all, upon the strength of the case which he is able to establish by evidence.

But it is not necessary to go as far as this to establish the unconstitutionality of the statute, since, by the terms of the affidavit, giving to the language its manifest signification, a defendant may often be precluded from making defence, when his constitutional right to a judicial investigation is clear.

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Without filing an affidavit, he cannot obtain the judgment of the court upon matter of law. *Clark* v. *Connecticut River Railroad Co.* 6 Gray, 363. How in such case can he make oath that he verily believes he has a defence, when he is unskilled in the law; when there are irreconcilable decisions upon the point involved, and when he is informed by his counsel that the chances of success and failure are in an equal balance?

Upon what construction of the affidavit, without making its language a falsehood and confounding all distinction between a legal fiction and the awful crime of perjury, can the defendant make oath that he believes he has a defence, when he has no knowledge of the facts involved, and from the nature of the case can acquire none? He is sued for an injury alleged to have been the result of his negligence. He knows that he was negligent; he knows that the injury happened; and he presumes a connection between the negligence and the injury. But the legal liability depends upon something more. Was the plaintiff negligent? This the defendant ordinarily cannot know till he puts the plaintiff to his proof. Suppose a case where the defendant's liability depends solely upon the question as to whom credit was given by the plaintiff. This is a matter the certain determination of which is beyond human power. The fact to be inquired of is, the intent which was existing in the plaintiff's mind. Is it less than the sacrilegious desecration of an oath to require a defendant to swear that he is clear in his conscience of a fact the truth of which is veiled from human sight in the breast of another? The defendant is sued upon a contract alleged to have been made by the plaintiff with the defendant's agent, who has absconded. He wishes to defend, to guard against collusion between the agent and the plaintiff. How can he swear that he truly believes, when his greatest belief is but suspicion? A ship sails for China. Two days after her departure, a vessel arrives dismasted by collision. The shipowner is sued for the negligence of his captain in the management of his vessel. How can the defendant make affidavit upon a subject upon which he knows, and in the course of nature can know, nothing? It may be said that in such case the time for filing the

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affidavit may, in the discretion of the court, be extended until he can by diligence inform himself. But it is also true that in the discretion of the court the time may not be extended; and the constitutional right of no person can be made dependent upon the discretion of a court.

Often the facts are in such doubt that a trial is necessary for the very purpose of determining them. The fiercest controversies in courts of justice arise where the facts are in such doubt that no one can verily believe them to be the one way rather than the other. In such cases, is the plaintiff legally entitled to a default; and can the defendant be constitutionally deprived of his jury? It is to settle controversies where the fact is in doubt, that juries were established; and a defendant cannot be required to make oath to the truth of a thing which he has a constitutional right to have a jury determine for him.

The plaintiff is not obliged to make oath that he believes he has a legal cause of action; and therefore, unless by the interpretation of the court the affidavit is made to speak a falsehood, the plaintiff may recover, not because he has a case which he can establish by evidence, but because the defendant, who, if a trial was had, would not be called upon, is precluded by the requirement of an affidavit from appearing in court.

By the affidavit, a defendant is sometimes shut out from his defence when it is his legal duty to make one; as in the case of an executor or guardian, or where he defends in any trust capacity to protect the interest of another. The requiring of the affidavit may in some cases even interfere with the duty of the court; as where an infant is defendant. In such case, in the language of Tilghman, C. J., in *Read* v. *Bush*, 5 Binn. 455, "the insisting on an oath from the defendant or his guardian is not consistent with that care and protection which have ever been extended to infants by courts of justice."

The length of time the statute has been in force unquestioned appears to afford the only argument which can be made in favor of its constitutionality. That its validity has not hitherto been questioned is accounted for by the danger which a defendant undergoes in risking his whole case upon this single point, which

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if decided against him is followed by an adverse judgment, and if determined in his favor advances him nothing in his defence; and by the further fact that the affidavit is in practice regarded in general but as an empty form. It has in no degree prevented the setting up of feigned defences. At July term of the court of common pleas for this county in 1850, the year before the passage of the act, over fifty-three per cent. of the entries were defaulted at the first calling of the docket. At the last July term of the superior court for this county, the defaults for want of an affidavit were less than fifteen per cent. of the entries, while in forty-one cases affidavits alone were filed not followed by answers.

The useless multiplication of oaths tends to destroy their sanctity; and courts should beware lest they make oaths administered in a court of justice of as little value and as much a by-word as those administered by the officers of the revenue. The statute is a bounty on crime, and an encouragement to villainy. It has utterly failed of its purpose, and the court in the furtherance of morality should put no straitened construction upon the terms of the affidavit, to enable it to be taken in all cases with a few grains of mental reservation, but should give those terms their full force according to the ordinary meaning of language, and hold the statute unconstitutional if it plainly appears to be in conflict with the Declaration of Rights.

Chapman, C. J. The action is upon a promissory note; and the defendant moves that he may be allowed to file an answer and defend the action without filing the affidavit required by the Gen. Sts. *c.* 129, § 45. The alleged ground of the motion is, that the statute is unconstitutional. The articles of the Constitution which the defendant's counsel refers to are in the Declaration of Rights: Article 1, which declares the right of protecting property; article 10, which declares the right of being protected in the enjoyment of property according to standing laws; article 11, declaring the right of having recourse to the laws for injuries, and obtaining right and justice completely and without denial; articles 12 and 15, declaring the right of trial by law, and by jury. These clauses are to be construed liber-

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ally in favor of the rights of the citizens; and if the statute is in conflict with any of them it is void.

The defendant contends that, without making affidavit, he has a right to appear in court, and to require the production of the plaintiff's proof, and the judgment of the court upon the effect and sufficiency of that proof. If this position is correct, the objection to the statute goes further than the defendant alleges. The requirement as to the affidavit is, that after ten days, or on the last day of the term, the court shall enter a default, unless the defendant, or some one in his behalf, files an affidavit that he verily believes that the defendant has a substantial defence to the action on its merits, and intends to bring the same to trial. But, if such an affidavit is filed, the defendant is not thereby permitted to require the production of the plaintiff's proof, or the judgment of the court upon it. By Gen. Sts. *c.* 129, §§ 17, 20, he must file an answer, which shall deny in clear and express terms the plaintiff's allegations, or declare his ignorance, so that he can neither admit nor deny, and leaves the plaintiff to prove the same; and which shall declare in clear and precise terms such substantive facts as he intends to rely upon in his defence. Therefore, if the affidavit were dispensed with, the defendant would still be obliged to file a written answer, signed by himself or his counsel. Unless he is in fact ignorant whether he made the note, or believes he did not make it, he cannot require the plaintiff to prove its execution, without signing and putting on record a false statement; and this would be, to a truthful and honorable person, hardly less objectionable than making the statement under oath. Nor can he set up any defence in avoidance of the note, without making a similar statement of the matter relied upon. The required statements of the answer, in order to enable him to defend, must be much more particular than the affidavit. But the objection goes still further. It lies against all the written pleas which defendants have been obliged to file in order to put the plaintiff upon proof of his case, not only ever since the Constitution was adopted, but ever since written pleadings were in use.

The system of special pleading was intended to require of

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parties written statements of what they believed to be true. But in some cases the common law required that a defendant should not only state his defence, but make oath to it. In actions of debt, and in several other species of action, the plaintiff might require him to wage his law; and this must be done upon oath. Bac. Ab. Wager of Law. In suits in equity, a defendant has always been obliged to make oath to the truth of his answer; and our statutes relieve him from this requirement at the option of the plaintiff, and not otherwise. Other instances might be cited where sworn statements and pleadings have been required. These provisions were more stringent than that of our statute requiring an affidavit of defence. But, when our Constitution was framed, they had never been regarded as encroachments on those rights which are declared in the clauses above referred to. Nor is there any reason to believe that the Constitution was designed to prohibit the legislature from enacting reasonable laws in regard to pleadings in civil actions, or from requiring averments to be supported by affidavits.

But the Constitution also declares that every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries to his property, and ought to obtain right and justice promptly and without delay, conformably to the laws. Before the enactment of the statute requiring an affidavit of defence, a creditor who brought an action upon an undisputed claim was subject to great and unreasonable delay; for it was a very general practice for defendants to appear and set up a defence for the mere sake of delay, although they knew they had no real defence, and had no intention to bring the cause to trial. The requirement in regard to the affidavit was designed to remedy this evil in the administration of justice; and we can see nothing unreasonable in it.

The defendant alleges that the affidavit is in practice regarded but as an empty form; that it is a bounty on crime and an encouragement to villainy; and has utterly failed of its purpose. That these are mistaken assertions is shown by the dockets throughout the Commonwealth. Soon after the statute went into operation, that class of cases in which pleas had been filed

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for mere delay disappeared, and we believe that there are very few cases where either parties or their attorneys could be induced to make affidavit, or file a false allegation in an answer, for the mere sake of delay. An attorney who will countenance such an act violates his duty.

The affidavit is very general; and in all cases when a defendant or his agent verily believes that the plaintiff has not a legal right to maintain his action for the cause alleged in his writ, upon the legal principles which govern the decision of causes in courts of justice, and intends to make a defence, he may safely make the affidavit. An oath requires that the substance, and not the mere form, of truth should be stated. Thus, when a jury returns upon oath a verdict that the defendant did not promise, or disseise, or is not guilty, it means only that the promise, or the disseisin, or the guilt, is not proven by legal evidence; this being the point in issue.

If it be said that the statute is unequal in requiring the defendant to take an oath, while the plaintiff is not required to do so, the answer is, that practically no great evil arises from permitting a party to commence an action without making an affidavit, for the expense and risk of bringing an action which he knows to be groundless, and paying the expenses in advance, is generally a sufficient check upon him. But defendants have had no such check; and the abuse occasioned by the delays which they have been able to obtain has been very great. The affidavit has proved to be expedient and useful; and there is no ground for regarding it as unconstitutional.

Judgment for the plaintiffs.

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CRIMINAL CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

AT THE

MARCH SESSION 1868, IN BOSTON.

PRESENT.

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. EBENEZER R. HOAR,
HON. HORACE GRAY, JR.,
HON. JOHN WELLS,
HON. JAMES D. COLT,
} JUSTICES.

COMMONWEALTH *vs.* DANIEL W. LARRABEE & another.

The provision of the Gen. Sts. *c.* 115, § 5, that "the courts shall not charge juries with respect to matters of fact, but may state the testimony and the law," does not restrain a judge from defining, in a charge to the jury, the degree of weight which the law attaches to a whole class of testimony, such as the testimony of accomplices, and leaving to the jury the application of the general rule to the circumstances of the case on trial; nor deprive the defendant of his right of exception, if the judge charges the jury that testimony of an accomplice against the defendant is corroborated by evidence which by the rules of law has not that effect.

On the trial of a criminal case, the judge, in charging the jury, recited evidence introduced by the Commonwealth to corroborate the testimony of an accomplice, and said that if the jury believed the witnesses there was such corroboration. *Held*, that the reasonable interpretation of this instruction was, not merely that the whole testimony of all the other witnesses, taken together, amounted to a corroboration of the accomplice, but that the testimony of each of them, taken by itself or with the aid of such other evidence only as was avowedly introduced in connection with it, was corroborative evidence.

On the trial of an indictment for larceny, the principal witness for the Commonwealth was an accomplice in the theft, who testified that on the morning before committing it he walked some distance (in part on a railroad, where he met M.,) to meet the two defendants by appointment; that then they three drove with a horse and wagon to a village where

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the defendants left him to buy luncheon; that he walked after them, and found them waiting for him and talking with a man whom he had seen in court; that then they three drove on further, and called at two houses for water, which he obtained at one from a woman, and at the other from a girl, both of whom he saw a few days before the trial, when taken by an officer to see them; and that then they waited until night, when they committed the larceny. To corroborate him, the Commonwealth called a witness who testified that, at some time during the month of the larceny, he saw such a horse and wagon standing on the road in that village, with two men in the wagon, and had some talk with the men, such as was stated by the accomplice, during which a third man came with a lunch, of which the three partook. The witness professed himself unable to identify either of the three men; but the judge admitted his testimony in connection with that of a woman and her daughter, and of two girls, who lived in neighboring houses situated substantially as described by the accomplice, (but at a distance of several miles from the place described by the previous witness,) all of whom identified the accomplice and the defendants as having called at their houses with such a horse and wagon, and obtained water, the day preceding the larceny. The defendants, testifying in their own behalf, denied ever having seen the witness who met the three men on the highway, or either of the female witnesses, denied also the whole story of the accomplice, and said that on the day preceding the larceny he came to them, at a place different from that named by him, and borrowed their horse and wagon, about ten o'clock before noon, which was inconsistent with his statement of the time when he met M. on the railroad. The Commonwealth, thereupon, to contradict the defendants, and corroborate the accomplice, called M. as a witness, who testified that one day in one of two months (one of them being the month of the larceny) he met the accomplice at the place described by him on the railroad, at an hour which the witness thought was about the middle of the forenoon. *Held*, that the accomplice was corroborated by the testimony of each of the other witnesses called by the Commonwealth, taken by itself or with the aid of such other evidence as was avowedly introduced in connection with it.

INDICTMENT for larceny of a horse. At the trial in the superior court, before *Reed*, J., the principal witness for the Commonwealth was Samuel Stone, who had been indicted as an accomplice with the defendants in the larceny. Other witnesses were Charles McIntire, Mrs. Blunt and her daughter, and two girls named Upton. There were witnesses also whose names were not stated in the bill of exceptions; and after the defendants had testified in their own behalf the attorney for the Commonwealth called Isaac Munroe as a witness in reply. There was also testimony relating to one Lapham and one Marshall, admitted to disprove any theory that they, and not the defendants, were companions with Stone in committing the larceny; which is immaterial. The substance of all the material testimony is stated in the opinion. The judge instructed the jury "that, although he could not say to them that they could not convict upon the uncorroborated testimony of an accomplice, yet it was

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not safe for them to do so; and that, before considering the testimony of Stone, they ought to see whether he was corroborated; that it was not necessary for his whole story to be corroborated, but that corroboration in some one material particular was sufficient." He further "recited the testimony which the government relied on as such corroboration, and among the rest that of McIntire and Munroe, and said to the jury that if they believed the witnesses then there was such corroboration." And he refused to make any modification of these instructions. The jury returned a verdict of guilty; and the defendants alleged exceptions.

S. B. Ives, Jr., & J. L. Stackpole, for the defendants.

C. Allen, Attorney General, for the Commonwealth.

Gray, J. The testimony of accomplices is competent, and often necessary, to prove the commission of a crime. But, as it involves a confession of participation by the witness in the guilt charged, and is liable to be exaggerated from hope of pardon or fear of punishment, the law views it with peculiar suspicion; and it is usual to instruct the jury, as was done in this case, that it is unsafe to convict upon such evidence, unless corroborated in some material particular. This is said in some of the English cases to be rather a rule of practice than a rule of law; but the statement of Lord Abinger in *Regina* v. *Farler*, 8 C. & P. 107, that "it is a practice which deserves all the reverence of law," has been often quoted with approval. Still, as the law, while holding such evidence to be of inferior quality, does not wholly exclude it, its effect in each case must finally be determined by the jury; and therefore, if the judge calls their attention to its suspicious character and need of corroboration, no exception lies to his refusal to direct them to acquit the prisoner if it is not corroborated, or to his instructing them that they may convict upon the uncorroborated testimony of an accomplice if it satisfies them beyond a reasonable doubt of the guilt of the defendant. But if evidence is submitted to the jury as corroborative, which is not legally such, the error may be revised by bill of exceptions. *Commonwealth* v. *Bosworth*, 22 Pick. 397. *Commonwealth* v. *Desmond*, 5 Gray, 80. *Commonwealth*

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v. *Brooks*, 9 Gray, 299. *Commonwealth* v. *Price*, 10 Gray, 472. *Simmons* v. *Simmons*, 1 Rob. Eccl. 575, and 5 Notes of Cases, 344. *Regina* v. *Stubbs*, 7 Cox Crim. Cas. 48, and Dearsly, 555. 3 Russell on Crimes, (4th Eng. ed.) 961–968. 1 Greenl. Ev. §§ 380, 381.

It was argued by the attorney general, that the Gen. Sts. *c.* 115, § 5, having provided that "the courts shall not charge juries with respect to matters of fact, but may state the testimony and the law," a judge has now no authority in this Commonwealth to advise the jury as to the weight to be allowed to the testimony of an accomplice, and that the defendants in this case have therefore no ground of exception to the instructions given. But the answer to this is twofold. In the first place, the statute referred to, while it restrains the judge from expressing an opinion upon the credibility of particular witnesses, does not preclude him from defining the degree of weight which the law attaches to a whole class of testimony, leaving it to the jury to apply the general rule to the circumstances of the case. *Commonwealth* v. *Barry*, 9 Allen, 276. And in the next place, if the judge had exceeded the limit fixed by the statute in this respect, it would not deprive the defendant of his right of exception to further instructions attributing to the testimony a weight to which it was not by law entitled, as would be the case if he should instruct the jury that the testimony of an accomplice was corroborated, when the other evidence introduced for the purpose of corroboration had not by the rules of law that effect.

The presiding judge in this case, as the bill of exceptions states, "recited the testimony which the government relied upon as such corroboration, and among the rest that of McIntire and Munroe, and said to the jury that if they believed the witnesses then there was such corroboration." The reasonable interpretation of this instruction, in our opinion, is, not merely that the whole testimony of all the other witnesses, taken together, amounted to a corroboration of the accomplice, but that the testimony of each of the witnesses called to corroborate him, taken by itself, or with the aid of such other evidence only as

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was avowedly introduced in connection with it, was corroborative evidence.

In order to determine whether there was any error in this instruction, it is therefore necessary to analyze the testimony of the accomplice and the evidence relied on by way of corroboration.

Stone, the accomplice, testified at the trial that the two defendants had previously agreed to meet him on the 23d of July with their horse and wagon at the Wilkins Farm, a place between South Danvers and Reading; that he on that day walked from South Danvers up the Lowell Railroad, (upon which he met and conversed with Isaac Munroe,) and thence up the highway to the rendezvous, and there found the defendants waiting for him, and they drove together towards Andover through Middleton, where he got out of the wagon and bought some luncheon in a shop, while the defendants drove on out of the village; that he walked after them, and found them waiting for him and talking with a man whom he had since seen in court; that they three drove on, and called at two farm-houses for water, which he obtained at one house from a woman, and at another from a little girl, both of whom he saw the Saturday before the trial, when he was taken by an officer to see them; that the three waited until night and then stole two horses out of a pasture and led them to Brighton, where they arrived about daylight and sold them on the 24th.

Charles McIntire testified that on some day in July he saw a horse and wagon (his description of which was a correct description of the defendants' horse and wagon) standing on the road in Middleton, with two men sitting in the wagon, and had some talk with them, (which he stated substantially as detailed by Stone,) and while they were talking a third man came up, bringing some crackers and cheese, of which all three partook. McIntire professed himself unable to identify the persons, and his testimony was objected to by the defendants on that ground, and was admitted by the court upon the statement of the district attorney that he proposed to identify them by witnesses who saw them further along the road. Mrs. Blunt and her

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daughter, and two girls named Upton, (who resided in Andover in two houses not far apart, situated substantially as stated by Stone, and several miles from the place described by McIntire,) testified that three men, whom they positively identified as Stone and the defendants, called in a wagon at their houses and obtained water on the 23d of July; and gave a similar description of their horse and wagon to that which McIntire had given. There was also evidence from other witnesses, (which does not appear to have been objected to, and as to which no argument has been addressed to us,) identifying the defendants as having been at Brighton with Stone on the 24th, with these horses in the possession of one of them.

The fact to be proved was, that the defendants and Stone stole the horses in Andover on the night of the 23d. The evidence last mentioned tended to show that they were in Brighton with the horses on the 24th. The testimony of McIntire, taken together with that of the Blunts and Uptons, (in connection with which it had been admitted,) tended to show that on the 23d they drove together in apparent intimacy several miles towards Andover. All this testimony corresponded with Stone's, and tended materially to corroborate him. It is not to be expected that each witness will be able to prove the connection of the accused with the accomplice throughout the whole criminal transaction. It is enough if the testimony of each witness proves joint action at any stage, and that it all tends to show the participation of the accused in the crime charged. Authorities above cited. *People* v. *Davis*, 21 Wend. 309.

The defendants denied the truth of Stone's whole story, and offered much testimony tending to prove that they were both in South Danvers during the whole of the 23d of July and the succeeding night. They testified that Stone borrowed the horse and wagon two days before, saying that he would come for it on that day, for the purpose of going after a horse which he had bought; that he did come about ten o'clock in the morning, and took the horse and wagon from the house of one of them more than a mile from the Wilkins Farm, and at such a time as was inconsistent with Stone's statement of the time when he met

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Munroe; that the defendants did not go to Middleton or North Andover, never saw McIntire, the Blunts or the Uptons, and had no knowledge of the larceny; that, becoming uneasy about the continued absence of Stone, they borrowed a horse and wagon of the father of one of them, and on the 24th drove to Brighton, and there found Stone with their horse and wagon, and the two stolen horses, which he said he had bought, and which one of the defendants at Stone's request then led to the auction stable and left there, and the defendants took their horse and wagon and drove home.

The district attorney, in reply, called Munroe, who was permitted, against the defendants' objection, and for the purpose of contradicting the defendants' testimony that Stone called at their house for the horse and wagon on the morning of the 23d of July, to testify that he remembered meeting Stone on some day in July or August (which he could not fix more definitely) and as he thought about the middle of the forenoon, on the Lowell Railroad, substantially in the place described by Stone. In the aspect of the case at the time when this testimony was offered, after the defendants had introduced their own and other testimony to disprove the truth of the whole of Stone's evidence, this testimony of Munroe tended to corroborate Stone in a particular which went to show the falsehood of the defendants' own testimony, and indeed of their entire defence; which was a most material particular directly tending to prove their guilt. *Commonwealth* v. *O'Brien*, 12 Allen, 183. *People* v. *Dyle*, 21 N. Y. 578. If previous testimony had precisely fixed the day, it is hardly denied that it would have been admissible. Its indefiniteness in this respect might affect its weight, but not its competency to be submitted to the jury, who were the proper judges whether the day was identified. *Commonwealth* v. *Annis*, 15 Gray, 197.

The evidence as to Lapham and Marshall was manifestly not part of the testimony upon which the Commonwealth relied by way of corroboration of Stone, and was therefore not embraced within the ruling excepted to. *Exceptions overruled.*

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COMMONWEALTH *vs.* JOHN J. GORHAM.

The word "conviction," as used in the provision of the Gen. Sts. *c.* 131, § 13, that the conviction of any crime may be shown to affect the credibility of a witness in any proceeding, civil or criminal, in court or before a person having authority to receive evidence, implies a judgment of court.

INDICTMENT for burning a dwelling-house. At the trial in the superior court, before *Ames*, C. J., the defendant testified in his own behalf; and to affect his credibility as a witness the attorney for the Commonwealth offered in evidence an original indictment for forgery found against him at a previous term of the court, and the record of the clerk, noted on the back thereof, that "the defendant pleads guilty," after which plea that indictment was put on file, but afterwards brought forward, and was entered on the docket and pending at the same time with this indictment for burning. The judge admitted this evidence against the objection of the defendant, who was found guilty and alleged exceptions.

A. R. Brown & E. A. Alger, for the defendant.

C. Allen, Attorney General, for the Commonwealth. 1. The conviction of any crime might be shown to affect the credibility of the witness. Gen. Sts. *c.* 131, § 13. *Commonwealth* v. *Bonner*, 97 Mass. 587. The term "conviction" in the Gen. Sts. sometimes implies a judgment of the court; but at other times does not. Persons may be convicted by confession in open court; by admitting the truth of the charge by plea or demurrer; or by the verdict of a jury accepted and recorded by the court. Gen. Sts. *c.* 158, § 5. Conviction does not mean the judgment passed upon a verdict. There is, in point of law, a difference between the pleas of *autrefois convict* and *autrefois attaint;* the former may be where there has been no judgment; the latter is founded upon a judgment. *United States* v. *Gibert*, 2 Sumner, 40, and authorities cited. *The Queen* v. *Faderman*, Temple & Mew, 286. 4 Bl. Com. 336. See also *Commonwealth* v. *Harris*, 8 Gray, 473. If the jury find a prisoner guilty, he is then said to be convicted. 4 Bl. Com. 362. Judgment

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and sentence follow. This distinction is recognized by the common use of legal language. "After conviction and before sentence;" "Proceedings to reverse a conviction, before sentence;" "The prisoner was convicted, and brought up to receive the judgment of the court;" are common expressions in the books. *The King* v. *Waddington*, 1 East, 143, 145. *Rex* v. *Bishop*, 1 Stra. 9. *Rex* v. *Morgan*, 1 Bulst. 84, 88. *Regina* v. *Layton*, 1 Salk. 106. 1 Bishop Crim. Proc. §§ 698–700. *The King* v. *Teal*, 11 East, 307. In Massachusetts it has been adjudged in reference to a former statute, that the legislature intended to distinguish between a conviction and a judgment. *Commonwealth* v. *Richards*, 17 Pick. 295. This view is supported by *Green* v. *Commonwealth*, 12 Allen, 172; *Commonwealth* v. *Weymouth*, 2 Allen, 144. The doctrine of the common law was, that conviction of an infamous crime, followed by judgment, rendered a witness incompetent. The proof could only be made by production of the record. 1 Greenl. Ev. § 372. *Cushman* v. *Loker*, 2 Mass. 108. But now a witness is not thereby rendered incompetent; though his conviction may be shown to affect his credibility. That is to say, the technical rule is done away with; but evidence of moral guilt may be introduced, to show the true character of the witness, morally. And for the purpose of aiding the judgment of a jury it is proper that a conviction for crime should be shown, whether judgment has followed thereon or not. It is now the policy of the law to impose few restrictions on the competency of witnesses, but to allow full and free proof of all matters affecting their credibility.

2. The mode of proof was proper. 1 Greenl. Ev. § 502. The clerk's minutes were sufficient, until the full record was extended. 1 Greenl. Ev. § 513. *Pruden* v. *Alden*, 23 Pick. 184. *Waters* v. *Gilbert*, 2 Cush. 31. *Read* v. *Sutton*, Ib. 115. *Tillotson* v. *Warner*, 3 Gray, 577.

Colt, J. The defendant in this case offered himself as a witness, and the rules of evidence affecting the competency or credibility of witnesses were all applicable to him in that character. *Commonwealth* v. *Bonner*, 97 Mass. 587.

It was the rule of the common law that the production of the

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complete record, including the conviction, technically so called, and the final judgment thereon, was necessary in order to show that a witness offered was incompetent on account of infamy. This rule is founded on the reason that it is always within the power of the court, on motion in arrest or for a new trial, to set aside a verdict illegally or improperly rendered, at any time before judgment; and the prosecution may in the end result in the defendant's acquittal.

Under the Gen. Sts. *c.* 131, § 13, no person can now be excluded by reason of crime from giving evidence as a witness, but the conviction of any crime may be shown to affect the credibility of the witness. The term "conviction" is used in at least two different senses in our statutes. In its most common use it signifies the finding of the jury that the prisoner is guilty; but it is very frequently used as implying a judgment and sentence of the court upon a verdict or confession of guilt. Gen. Sts. *c.* 160, § 8; *c.* 173, § 1. In *c.* 174, the several sections relating to judgment and execution in criminal cases plainly describe the situation of the prisoner when nothing remains but the sentence. And in the several chapters which define and punish offences against persons, property, public morality and health, the words "conviction" and "convicted" describe the same condition of the offender. We think the obvious purpose of the legislature was to restore the competency of a witness against whom the record of a judgment for crime was produced, but to permit the same evidence to be used as affecting his credibility, (in all cases requiring the same complete record of the whole case,) and that the word "conviction" is here used in the broader and less technical sense, and implies the judgment of the court. It could not have been the purpose of the lawmakers to permit evidence of moral guilt, as distinguished from guilt legally established, to be produced against the witness. If this were so, then the finding of an indictment by the grand jury, which was afterwards quashed, or upon which a *nolle prosequi* was entered, might with equal propriety be permitted to be shown. *Exceptions sustained.*

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Commonwealth *vs.* William Grose.

On the trial of an indictment for larceny of six oxen, after introducing evidence that the oxen were stolen and killed and their meat was sold, the Commonwealth proved admissions of the defendant that he killed them and sold the meat on account of a person to whom he paid the whole proceeds of the sale, being a sum named. *Held*, that the Commonwealth might also prove, with a view to show the falsity of the defendant's statement of his disposal of the proceeds, that on the day of the sale he bought other oxen of another person and paid for them a sum nearly the same; and that his whole property was mortgaged for more than it was worth, and he had no pecuniary credit. *Held, also*, that statements of the person to whom the defendant claimed to have paid the proceeds, that he himself stole "two other oxen" which were found astray on a highway on the same day on which the six were killed, were inadmissible, either to affect the credibility of such person as a witness, or to prove that he "had stolen those two oxen and that they were part of the original six."

Indictment for stealing six oxen from Nathaniel Jackson in Brighton.

At the trial in the superior court, before *Ames*, C. J., there was evidence that the oxen were stolen from Jackson on Saturday, July 20, 1867, and slaughtered in the defendants' close on Sunday, July 21; that the meat was sold at market in Boston on Monday, July 22, by the defendant; and that the defendant acknowledged that he killed the oxen and sold the meat, but stated that he did so on account of Samuel Davis, and that he paid to Davis the whole proceeds of the sale, amounting to $480 after deducting his own commissions. "To disprove this latter part of his account," the attorney for the Commonwealth was allowed to prove, against the defendant's objection, that on Monday, July 22, the defendant bought a number of cattle from Albert Munroe, and paid for them $475 in money; that all the defendant's property was mortgaged for more than its value; and that before and at the time in question the defendant had no pecuniary credit in Brighton or its vicinity.

George E. Temple, one of the defendant's witnesses, having testified that on a Sunday in July 1867, which he thought was between July 18 and July 22, he found "two other cattle" astray on the highway, and put them into the yard of one Wilkins; and that Davis afterwards took them away; was asked by the defend-

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ant what Davis said about these two cattle; "but, on objection, the judge inquired whether the proposed evidence was for the purpose of showing any act or declaration of Davis contradicting his own testimony; and, the answer being that it was not for that purpose, but to prove an independent fact, namely, that Davis had stolen those two cattle, and that they were part of the original six, the judge ruled it to be incompetent, and excluded it."

The defendant was found guilty, and alleged exceptions.

C. Cowley, for the defendant.

C. Allen, Attorney General, for the Commonwealth, cited *Commonwealth* v. *Montgomery*, 11 Met. 534.

CHAPMAN, C. J. The competency of the evidence to prove admissions made by the defendant as to what he had done with the stolen cattle, the amount for which he sold their flesh, and the disposition which he had made of that amount, is not denied. It was also competent to prove that any part of his statement was false. The evidence objected to tended to prove that his statement that he paid to Davis the entire proceeds of the sale, amounting to $480, deducting his own commissions, was false. It tended to prove that on the day when he stated that he paid this money to Davis, he paid nearly that amount to another person; and that he had neither property nor credit by means of which he could have raised the money to pay Davis. The evidence as to his property and credit was therefore pertinent and material.

The testimony of Temple was properly rejected, because it was not pertinent to the case. Evidence that Davis stole the two cattle which were put into Wilkins's yard would not be competent for the purpose of impeaching him. *Commonwealth* v. *Churchill*, 11 Met. 538. And no other purpose is stated for which it could be competent. *Exceptions overruled.*

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Commonwealth *vs.* Malachi Donovan.

On the trial of a cause, whether criminal or civil, the decision of the presiding judge to grant or to refuse a motion for a continuance or postponement on account of the absence of a witness is not a subject of exceptions.

Indictment for breaking and entering a building on November 21, 1867, in the night time, with intent to steal.

At the trial in the superior court, before *Putnam*, J., at the close of the testimony introduced by the Commonwealth, the defendant's counsel moved for the case to be continued, presenting as a basis for the motion the affidavit of Hannah Davis, a sister of the defendant, to the effect that Peter Boodro, a barber, was prevented by sickness from attendance as a witness, who if present would testify that the defendant was in his barber's shop at six o'clock on the evening of the day charged in the indictment, and remained there until twenty minutes past six, when he went away in company with a person named. The attorney for the Commonwealth indorsed on the affidavit thus offered, that "the Commonwealth admits that the witness herein named would testify to the facts set forth in this affidavit." The defendant's counsel then made and presented his own affidavit that he believed "that it is unsafe for the defendant to proceed to trial without the presence of Peter Boodro in court." But the judge nevertheless overruled the motion for a continuance. The trial proceeding, the affidavit of Hannah Davis was read to the jury, and the attorney for the Commonwealth said to them at the time, and repeated in his argument, "that they were to take it that Boodro, if present, would testify to the facts set forth in the affidavit;" and the judge so instructed them, and further said to them that Boodro "was to be considered as a witness unimpeached."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

N. Richardson, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

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WELLS, J. Such incidents of the trial as motions for continuance or postponement are within the discretionary power of the judge presiding, and are not open to exception or revision by this court. *Reynard* v. *Brecknell*, 4 Pick. 302. *Converse* v. *Carter*, 8 Allen, 568. The practice of allowing such motions, when made on account of the absence of a witness, to be met by a concession that the witness would testify as stated in the affidavit accompanying the motion, giving to it the force and effect of a deposition of the witness, is generally adopted in our courts in civil cases. It has also been allowed in criminal proceedings, with the sanction of this court. *Commonwealth* v. *Knapp*, 9 Pick. 496, 515. It is true that in some cases such a concession would be a very inadequate substitute for the testimony of the absent witness. In such cases it might be proper for the court to require the facts themselves to be admitted, or to grant the postponement. But it would be impossible to lay down any rule of law as a guide by which to determine the question. All the circumstances which bear upon the propriety of one course or the other, the evidence of diligence, the indications of good faith or the contrary, the importance of the testimony, and the means of supplying the deficiency from other sources, are before the judge at the trial as they cannot be presented to any revisory tribunal. These considerations show the propriety of holding the whole matter of continuance or postponement to be entirely within the discretion of the judge at the trial. They apply to criminal as well as to civil causes. The statute authorizes exceptions in "cases civil or criminal" in the same terms, and limits them to "matters of law."

Exceptions overruled.

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COMMONWEALTH *vs.* ANNA WILSON.

The thirty-second rule of this court, regulating the mode of establishing the truth of disallowed exceptions, applies to criminal equally with civil cases.

INDICTMENT for larceny from the person. In the superior court, after a verdict against the defendant, exceptions were allowed, which she waived at the argument in this court, when she filed a petition for leave to establish the truth of other exceptions disallowed below. The attorney general objected on the ground that he had received no notice of the petition in conformity with the thirty-second rule of this court, which provides that "in all cases" "no party shall be allowed to establish the truth of any such allegations in this court if he shall have failed to" "give notice of said petition to the adverse party by delivering a copy thereof to him or to the attorney of record ten days at least before" "the term of the court at which the exceptions would by law have been entered if duly signed and allowed." The fact that no such notice had been given was admitted by *F. F. Heard*, who appeared for the defendant and argued that the rule was limited to civil cases.

CHAPMAN, C. J. It is settled that in a civil action a petition for leave to establish in this court the truth of exceptions which have not been allowed by the superior court must be dismissed, if the petitioner has not given ten days' notice before the time in the term when the exceptions would have been entered if they had been allowed, in conformity with the rule of this court. *Elwell* v. *Dizer*, 1 Allen, 484. The rule applies equally to criminal cases. *Petition dismissed.*

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COMMONWEALTH *vs.* CHARLES O. BERRY.

If goods of a master fraudulently appropriated by his servant were, at the time of such appropriation, in the possession of the master, whether actual or constructive, although in the custody of the servant, the crime is larceny.

Although a servant has the custody of goods which he receives from his master to use for a specific purpose, the possession remains in the master.

The servant of a copartnership fraudulently appropriated money which he had received from one member of the firm under the direction to carry it to another member. *Held*, that he was not liable on an indictment for embezzlement.

INDICTMENT, stated in the bill of exceptions to have been found on the Gen. Sts. *c.* 161, § 41, for embezzling bank bills of the amount and value of $950.

At the trial in the superior court, before *Brigham*, J., these facts appeared: The defendant was in the employment of a firm of furniture dealers, consisting of Daniel Shaler and George W. Safford and others, who had a factory in South Boston and a warehouse in the city of Boston proper. His special duty was to drive a team; but he was liable to perform any other kind of service which might be assigned to him by his employers. On July 20, 1867, Shaler directed the defendant to get $950 from Safford at the warehouse, and bring the same to Shaler at the factory. In pursuance of this direction, the defendant applied to Safford for the money, and Safford delivered to him a package of bank bills of the amount and value requested. The defendant never carried the package to Shaler; but left the state; remained absent for several weeks; and on returning reported to his employers that after receiving the money he visited several tippling shops, became drunk and unconscious, and did not regain his senses till the morning of July 21, when he found himself lying in a doorway on Long Wharf in Boston, that he lost the money during this period of drunkenness, and that on discovering the loss his shame was such that on the afternoon of that day he ran away without first seeing his family or any of his friends, and without telling anybody of his misfortune. But there was also evidence offered to show that he left Boston on the afternoon of July 20.

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The defendant asked the judge to rule "as to the defendant's relations to his employers, and the delivery of the property to him, that said facts proved, if any crime, the crime of simple larceny, and not embezzlement; that, if embezzlement, it was embezzlement within the Gen. Sts. *c.* 161, § 38; and that said indictment could not be maintained under the evidence." The judge refused so to rule; and instructed the jury, on the contrary, "that, if the defendant was guilty, he was guilty of embezzlement as set forth in said indictment, and not larceny." The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. H. Bradley, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

Hoar, J. The bill of exceptions states that this indictment was found under Gen. Sts. *c.* 161, § 41. It seems to be a good indictment under that section, or under § 35 of the same chapter. *Commonwealth* v. *Concannon*, 5 Allen, 506. *Commonwealth* v. *Williams*, 3 Gray, 461. But the more important question is, whether, upon the facts reported, an indictment can be sustained for the crime of embezzlement. The statutes creating that crime were all devised for the purpose of punishing the fraudulent and felonious appropriation of property which had been intrusted to the person, by whom it was converted to his own use, in such a manner that the possession of the owner was not violated, so that he could not be convicted of larceny for appropriating it. Proof of embezzlement will not sustain a charge of larceny. *Commonwealth* v. *Simpson*, 9 Met. 138. *Commonwealth* v. *King*, 9 Cush. 284. In the case last cited, it is said by Mr. Justice Dewey that "the offences are by us considered so far distinct as to require them to be charged in such terms as will indicate the precise offence intended to be charged." "If the goods are not in the actual or constructive possession of the master, at the time they are taken, the offence of the servant will be embezzlement, and not larceny." We see no reason why the converse of the proposition is not true, that, if the property is in the actual or constructive possession of the master at the time it is taken, the offence will be larceny, and not embez-

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zlement. And it has been so held in England. Where the prisoner was the clerk of A., and received money from the hands of another clerk of A. to pay for an advertisement, and kept part of the money, falsely representing that the advertisement had cost more than it had; it was held that this was larceny and not embezzlement, because A. had had possession of the money by the hands of the other clerk. *Rex* v. *Murray*, 1 Mood. 276; *S. C.* 5 C. & P. 145. The distinction is between custody and possession. A servant who receives from his master goods or money to use for a specific purpose has the custody of them, but the possession remains in the master.

The St. 14 & 15 Vict. *c.* 100, § 13, provided that whenever, on the trial of an indictment for embezzlement, it should be proved that the taking amounted to larceny, there should not be an acquittal, but a conviction might be had for larceny. We have no similar statute in this Commonwealth.

In the present case, the defendant, who was employed as a servant, was directed by one member of the firm who employed him to take a sum of money from him to another member of the firm. He had the custody of the money, but not any legal or separate possession of it. The possession remained in his master. His fraudulent and felonious appropriation of it was therefore larceny, and not embezzlement. *Commonwealth* v. *O'Malley*, 97 Mass. 584. *Commonwealth* v. *Hays*, 14 Gray, 62. *People* v. *Call*, 1 Denio, 120. *United States* v. *Clew*, 4 Wash. C. C. 702.

In *People* v. *Hennessey*, 15 Wend. 147, cited for the Commonwealth, the money embezzled by the defendant had never come into the possession of his master. And in *People* v. *Dalton*, 15 Wend. 581, the possession of the defendant was that of a bailee.

Exceptions sustained.

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COMMONWEALTH *vs.* LOUISA LUCKIS.

On the trial of an indictment for an attempt to steal a pocket-book from the person, the evidence showed that a police officer, seeing the defendant put her left hand into the pocket of another woman, grasped the wrist of that hand; and that the defendant then raised the hand in and with the pocket, and let it fall again suddenly, tearing the pocket, when the pocket-book fell to the ground. *Held*, that there was no ground of exception to the refusal of the judge to rule that on this evidence "there was a sufficient caption and asportation to constitute larceny," and to his instructing the jury that "if they were satisfied, beyond a reasonable doubt, that the defendant's hand had been thrust into the woman's pocket with a felonious intent, and was arrested in the pocket while attempting to execute that intent, and before it had reached or disturbed the pocket-book, they might find her guilty of the offence charged in the indictment."

INDICTMENT for an attempt to commit larceny of a pocket-book from the person of a woman unknown. Trial in the superior court, before *Vose*, J., who allowed a bill of exceptions in substance as follows:

The only witness for the Commonwealth was a police officer, the material part of whose testimony was this: "I saw the defendant put her left hand into the pocket of an old lady. I stepped forward and caught her by the left wrist while her hand was in the pocket. She immediately raised her hand in the air, with the dress, her hand being still in the pocket, and my hand still upon the defendant's hand; and, bringing her hand down again suddenly, tore the dress and pocket to the ground, the pocket-book dropping to the ground. She said, 'Let go my hand. Who are you? Are you an officer?' I told her I was, and that she must go with me. The pocket-book dropped after the dress and pocket had been torn." There was no evidence that the defendant placed her hand upon the pocket-book. The witness also testified to other facts tending to show the guilt of the defendant.

The defendant offered no evidence, but asked the judge to instruct the jury "that, on the evidence as given on the part of the Commonwealth, there was a sufficient caption and asportation to constitute larceny, and so the indictment was not supported; that any movement made by the defendant to alter the

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position of the pocket-book of the party named in the indictment with a view to take it away was a sufficient asportation, and that no manual taking was necessary." The judge declined so to rule; and instructed the jury "that if they were satisfied, beyond a reasonable doubt, that the hand of the defendant had been thrust into the woman's pocket with a felonious intent, and was arrested in the pocket while attempting to execute that intent, and before her hand had reached or disturbed the woman's pocket-book, they might find her guilty of the offence charged in the indictment; that any alteration in the position of the pocket-book in the woman's pocket, caused by the struggle between the defendant and the officer, the pocket-book not having been nor being in the defendant's hand, or in contact with it, would not be such a caption or asportation as to constitute the offence of larceny instead of the offence charged; but that if the defendant's hand had reached or seized the pocket-book, before it was arrested by the officer, or during the struggle, and she altered the position of the pocket-book in the attempt to secure or retain it, this would be such a caption or asportation as would make it their duty to acquit the defendant."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

F. F. Heard, for the defendant, cited *Rex* v. *Thompson*, 1 Mood. 78; *Regina* v. *Simpson*, Dearsly, 421; 2 Russell on Crimes, (4th Eng. ed.) 359.

C. Allen, Attorney General, for the Commonwealth.

Colt, J. The defendant, waiving all objections to the form of the indictment, relies now only upon alleged errors in the rulings and instructions of the court upon the evidence.

The case shows an attempt manifested by an act, which was the beginning of a larceny, the completion of which was interrupted by an intervening circumstance not within the control of the prisoner. To justify a conviction, it was necessary to show that she failed in the perpetration, or was prevented in the execution of the offence of stealing from the person, — an offence which could only be complete when the property sought to be taken was in the full custody and control of the defendant. It

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is not indeed necessary that the pocket-book of the prosecutor should have been removed from the pocket, if once within the grasp of the thief, to constitute larceny. *Rex* v. *Thompson*, 1 Mood. 78. But the prisoner must for an instant at least have had perfect control of the property. There was nothing in the evidence reported which would justify the court in instructing the jury that there was such instantaneous caption and asportation in this case. Nor is there any evidence to which the last part of the instructions asked could be applied. It was not until after the hand was seized by the officer, and after all intention to commit any larceny must have been abandoned, that the pocket-book fell from the pocket in the struggle which ensued.

There was no error in the instructions given, or in refusing those asked. *Exceptions overruled.*

COMMONWEALTH *vs.* TIMOTHY HURLEY.

Evidence that one of a noisy crowd near a police officer cried "Kill the damned son of a bitch," about the time when others knocked the officer down, is sufficient to warrant his conviction for an assault upon the officer.

INDICTMENT for an assault upon Seth W. Fogg, a police officer, on July 4, 1867, at Boston.

On the trial in the superior court, before *Brigham*, J., Fogg testified that, about five o'clock in the afternoon of the day charged, he was in Kneeland Street in Boston endeavoring to take a prisoner to the police station, when a crowd of at least two hundred persons gathered there, some of whom knocked him down, but "that he did not receive a blow to his knowledge from the defendant, nor hear his voice, nor see him on said day until he saw him in the station-house after his arrest." Joseph M. Towne, another police officer, testified that the crowd was of "not far from five thousand people," and that he saw the defendant not further than four or five feet distant from Fogg, and heard him cry out there, "Kill the damned son of a bitch!" but

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did not know of whom or to whom the cry was made; that "there was great noise and confusion, and many persons were shouting;" and that "about that time" Fogg was knocked down, but the defendant did not strike Fogg, nor make any violent motion towards him. Another police officer, named Foster, testified that on the occasion in question he did not see the defendant strike anybody or make any motion of violence, but heard him cry out, "Kill the damned sons of bitches!" and thereupon arrested him, without knowing of whom or to whom he was crying.

The defendant asked the judge to rule that this evidence was not sufficient to warrant his conviction; but the judge refused so to rule, and instructed the jury "that if in a tumultuous crowd the defendant saw a person by him known to be an officer in the discharge of his duty assaulted, and used words, acts or gestures which might tend to incite and encourage the person then assaulting the officer to assault him, he might be convicted of an assault, notwithstanding he did not in person touch or injure the officer."

J. S. Holmes, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

CHAPMAN, C. J. The instructions given were correct, and the evidence as reported is sufficient to authorize the verdict. *Brown* v. *Perkins*, 1 Allen, 89. *Exceptions overruled.*

COMMONWEALTH *vs.* ADDISON BROOKS.

A marketman who had a lawful right to occupy with his wagon a stand in a street in a city from and after a certain hour, drove his wagon into the street twenty three minutes before the hour, and was so delayed there in his progress towards his stand, being stopped in one place five or six minutes by the crowding of other vehicles, that it was fifteen minutes before the hour when he reached the stand, where he stopped with his wagon until after the hour. *Held*, that he did not violate an ordinance of the city, which provided that no owner or driver of a wagon should suffer it to stop in any street more than twenty minutes in any case.

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COMPLAINT for the violation of § 34 of an ordinance of the city of Boston relating to carriages, which section is printed in the margin,* (Laws & Ordinances of Boston, ed. 1863, p. 106,) in suffering the defendant's wagon to stop in South Market Street in Boston more than twenty minutes.

At the trial in the superior court, before *Vose*, J., these facts appeared: The defendant, who was indicted as residing in Boston, was a marketman who brought vegetables daily from Arlington to Boston, where he sold them at a stand in South Market Street, all of which street except the southern sidewalk is included by a city ordinance within the limits of Faneuil Hall Market. Laws & Ordinances of Boston, (ed. 1863,) 170. His stand adjoined the sidewalk on the north side of the street, and was duly assigned to him, under the ordinance last cited, to occupy with his wagon for the sale of vegetables from four o'clock each afternoon, and before eleven o'clock each morning.

"On September 4, 1867, the defendant, with an ordinary market wagon, drawn by one horse driven by himself, and laden with vegetables, arrived in Commercial Street at the east end of South Market Street, at about twenty-five minutes before four o'clock in the afternoon," for the purpose of driving to his stand; "and at twenty-three minutes before four o'clock he drove into South Market Street, in company with several other marketmen. The street was somewhat crowded; and his progress through it to his stand was delayed by other vehicles; and

* "No owner, driver, or other person having the care or ordering of any chaise, carryall, hackney carriage, truck, cart, wagon, handcart, sleigh, sled, handsled, or any other vehicle whatsoever, new or old, finished or unfinished, with or without a horse or horses, or other animal or animals harnessed thereto, shall suffer the same to stop in any street, square, lane, or alley of this city more than five minutes, without some proper person to take care of the same, or more than twenty minutes in any case; and any person so offending shall be liable to a fine of not less than three, nor more than twenty dollars for each offence. But this section shall not apply to the carriages of physicians while visiting the sick, or to the vehicles of market and provision men, who may stand with the same, without the limits of Faneuil Hall Market, until eleven o'clock in the forenoon, at such places in the city as the board of aldermen may designate, for the purpose of vending provisions."

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at one place in the street, about fifteen rods from the stand he afterwards occupied, he was stopped five or six minutes, remaining on his wagon; and then drove upon and occupied his stand," which he reached at fifteen minutes before four o'clock, and where his wagon remained till the following morning.

On these facts, the attorney for the Commonwealth asked the judge to instruct the jury "that if the defendant went into South Market Street more than twenty minutes before four o'clock in the afternoon, with the purpose of remaining in said street more than twenty minutes, and did remain therein more than twenty minutes, the act was in violation of the ordinance on which the complaint was founded, although he moved from place to place in said street during the time, if such moving was not for the purpose or with the intent of getting out of the street, but was for the purpose and with the intent of keeping in the street;" and the judge, with the consent of the defendant, directed the jury to return a verdict of guilty, and reported the case for the revision of this court.

N. Richardson, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

GRAY, J. It is very clear that the defendant was not proved to have violated the city ordinance on which he was prosecuted. No person transgresses the ordinance, who does not voluntarily suffer his vehicle to stop in the street for more than twenty minutes. The defendant indeed drove into South Market Street more than twenty minutes before four o'clock, and intended to remain in that street until four o'clock. But he had the right to travel in the street, if he did not voluntarily suffer his vehicle to stop in it for the prohibited period. If he had arrived on his stand more than twenty minutes before four o'clock and voluntarily remained there with his wagon until that hour, or if he had voluntarily stopped his wagon for more than twenty minutes at any other place in the street, it would have been a violation of the ordinance. So perhaps, if he had stopped, for more than twenty minutes in all, in two places near each other, in the execution of one purpose. But it is unnecessary in this case to consider under what circumstances repeated intermissions of

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travel, or time spent in driving about the street without intention of moving onward towards a particular destination, might be treated as going to make up one stopping, within the meaning of the ordinance; for it appears that the defendant, while driving his wagon through the street towards his stand, was delayed by the crowding of other vehicles which he could not control, for five or six minutes, and then drove on and occupied his stand. He did not voluntarily stop at all before arriving at his stand; he did not stop on his stand but fifteen minutes before four o'clock; and after four o'clock, being a marketman, engaged in bringing vegetables into the city and selling them from his wagon at a stand occupied by him within the established limits of the market, though in a public street, he is admitted to have had a right, by virtue of the exception in the ordinance, and of the St. of 1859, *c.* 211,* to be and remain upon his stand with his wagon. *New trial ordered.*

* The material part of this statute is as follows: § 1. "The city of Boston shall make no by-law, ordinance or regulation excluding from the occupation of street stands within the limits of Faneuil Hall Market in said city, as the same are or may be defined in the city ordinances, for the sale of fresh provisions and perishable produce, any persons taking such stand for the sole purpose of selling such fresh provisions or perishable produce, provided the same are the product of the farm of the person offering them for sale, or of some farm within ten miles from the residence of such person." § 2. "The said city shall make no by-law, ordinance or regulation, prohibiting the occupation of stands within said limits and the sale of fresh provisions and perishable produce by the persons hereinbefore mentioned, between the hours of four o'clock in the afternoon and the time of closing said market at night, or before ten o'clock in the forenoon, except on Sundays and holidays." By the St. of 1860, *c.* 152, this last named time was extended to eleven o'clock in the forenoon.

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CASE

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF WORCESTER, APRIL TERM 1868, AT WORCESTER.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. DWIGHT FOSTER, }
HON. JOHN WELLS, } JUSTICES.
HON. JAMES D. COLT, }

COMMONWEALTH *vs.* SILAS JAMES & another.

Where two persons were indicted jointly for murder, and there was evidence tending to show that one of them had made a confession which implicated both, it was *held* that separate trials ought to be granted, if such evidence was to be offered.

On the trial of an indictment for murder, the Commonwealth called a witness who testified to seeing the two defendants come from a room where the dead body was found, under such circumstances as tended to show that they were guilty of the crime. *Held*, that the Commonwealth could not show, by other witnesses, that immediately, and while giving the alarm, he told what persons he saw come from the room, and gave their names.

Although by consent, or for reasons of incompetency, the confession of the defendant is to be excluded, on the trial of an indictment for murder, it may be proved that he said something about a particular weapon, (without giving his words,) in consequence of which a witness went to a certain place and there found such a weapon.

INDICTMENT against Silas James and Charles T. James for the murder of Joseph G. Clark.

Before the jury were called, the counsel of Silas James moved

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that he might have a separate trial, assigning specially as reason therefor that in support of the prosecution evidence would probably be introduced of a confession by Charles T. James, which implicated both himself and Silas in the commission of the crime as charged in the indictment. And the testimony of a witness before the coroner's jury was read, which tended to prove such confession.

G. F. Verry & S. Utley, for Silas James. It is the custom to grant separate trials of prisoners indicted together, whenever requested. *United States* v. *Marchant*, 4 Mason, 170, 171. In the present case, the evidence of the confession will be competent against one of the prisoners, and incompetent against the other; but neither counsel nor court could prevent its having an effect upon the minds of the jury against Silas. Certainly the court would feel it a duty to keep this evidence from prejudicing the case of Silas. See *Commonwealth* v. *Robinson*, 1 Gray, 555. But as the confession itself implicates Silas in express terms, his case could not fail to be prejudiced. Besides: if the two prisoners are tried together, each has his right to challenge twenty-two jurors peremptorily. The result may follow that one of the prisoners will challenge certain jurors whom the other would wish to retain upon the panel; and thus the rights of each will be prejudiced.

C. Allen, Attorney General, for the Commonwealth. It is the general custom, when prisoners have been indicted together, to try them together. Judge Story himself thought differently as to this, after giving the opinion in *United States* v. *Marchant*. See *United States* v. *Gibert*, 2 Sumner, 63, 64; *Commonwealth* v. *Robinson*, 1 Gray, 555; *State* v. *Soper*, 16 Maine, 293; *State* v. *Conley*, 39 Maine, 78; *United States* v. *Collyer*, Wharton on Homicide, (Appx.) 489, 490; *United States* v. *Kelly*, 4 Wash. C. C. 528; *State* v. *Wise*, 7 Rich. 412; *State* v. *McGrew*, 13 Rich. 316; *Mask* v. *State*, 32 Mississippi, 405; *United States* v. *Wilson*, Baldwin, 81. The granting of this motion is a matter of discretion in the court. The fact that either or each of the prisoners charges the other with the crime has been held insufficient. Such accusation is common, when the evidence is strong.

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Maton v. *People*, 15 Ill. 536. And it has been very often held that a prisoner's right of challenge is merely a right to exclude jurors to whom he objects; and not to insist on being tried by jurors whom he likes.

CHAPMAN, C. J. The general rule is, that persons jointly indicted should be tried together. It is conceded that the court may in its discretion order separate trials. This should not be done unless it appears that one or more of the defendants may be prejudiced by a joint trial. The fact that it may affect their right of challenge is not a sufficient reason for directing separate trials. If it were, it would be a reason for changing the general rule, as it applies to all cases. But in the present case, if the Commonwealth intends to offer in evidence the whole confession of Charles T. James, its application to Silas James as well as to himself may prejudice Silas, and the motion should be granted. We regard this, however, as an exceptional case. It will generally be safe to try parties together, although some admissions may be made by one that are not binding on the other.

The attorney general (after consultation with *H. Williams*, district attorney, who was with him,) said that he would not offer the evidence of the confession. The motion for separate trials was thereupon overruled; the jury were impanelled; and the trial proceeded.

There was evidence tending to show that a woman, who was the mistress of Clark, came, as usual, to his room, a little before seven o'clock on the evening of the murder, and, being unable to get in, waited upon the stairs until after nine o'clock, when she saw two persons come out, with the collars of their coats turned up so as partially to conceal their faces, and she immediately went in and found Clark dead, with his head cut open, and the room on fire, and came out at once, crying, and went into a room on the opposite side of a passage, and gave the alarm to two persons who were there. The woman testified that the two persons whom she saw come out of Clark's room were the prisoners. The Commonwealth then offered to show, by one of the other witnesses, that, when she first gave the

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alarm, she told what persons she saw come out of the room, and gave their names. Objection being made, the attorney general stated that he would not ask the witness what persons she named, but sought simply to show that she did name some persons. But the evidence was excluded.

There was evidence tending to show that the murder was committed by cutting Clark's head open with a hatchet. A police officer, called as a witness, was asked if Charles T. James, at any time after arrest, said anything to him about a hatchet, in consequence of which he did anything; and, if so, what he did.

P. E. Aldrich, for Charles T. James, objected to this testimony, on the ground that a confession had already been procured from the prisoner under such circumstances as would have made it incompetent, even without the agreement to waive the proof of it; that what he said subsequently, while under the same influence, was also incompetent; and that the prisoner ought not to be compelled to furnish evidence against himself.

The attorney general cited 2 Hawk. *c.* 46, § 38; 1 Archb. Crim. Pr. (Waterman's ed.) 130; *Commonwealth* v. *Knapp*, 9 Pick. 511.

The witness stated, in reply to a question, that nothing was said by Charles T. James at the time of this conversation in any way referring to Silas. He was thereupon allowed to testify that Charles did say something about a hatchet, in consequence of which the witness went to a canal and there found a hatchet which it was contended on the part of the Commonwealth was shown by other evidence to have been purchased by Charles on the day of the murder.

The prisoners were both convicted of murder in the first degree; and were hanged.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF BERKSHIRE, SEPTEMBER TERM 1868, AT LENOX.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. EBENEZER R. HOAR,
HON. HORACE GRAY, JR.,
HON. DWIGHT FOSTER,
HON. JOHN WELLS,
} JUSTICES.

COMMONWEALTH *vs.* ALBERT TRYON & another.

A husband and wife may be jointly indicted on the Gen. Sts. c. 87, §§ 6, 7, and, upon sufficient proof, both convicted, of keeping a liquor nuisance.

Evidence that a wife, who lived with her husband in a building kept as an inn by him, and used for the illegal keeping and sale of intoxicating liquors, made such illegal sales in his absence, and in his absence declared that they did sell, is sufficient to warrant her conviction on a joint indictment with him for keeping a liquor nuisance.

INDICTMENT of Albert Tryon and Florilla F. Tryon for keeping and maintaining a building in Monterey, used for the illegal keeping and illegal sale of intoxicating liquors, in violation of the Gen. Sts. *c.* 87, §§ 6, 7, which provide that "all buildings, places or tenements, resorted to for prostitution, lewdness or illegal gaming, or used for the illegal keeping or sale of intoxicating liquors, shall be deemed common nuisances," and that "whoever keeps or maintains" such a common nuisance shall be punished by fine or imprisonment.

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The defendants filed a plea in abatement alleging that during the whole time charged they were husband and wife living together in the building, and therefore could not lawfully be joined in the indictment, which plea was overruled in the superior court, by *Reed*, J., on demurrer.

"At the trial the Commonwealth offered evidence proving sales of intoxicating liquors upon the premises and within the time named in the indictment, by each of the defendants, and sometimes by the wife when the husband was absent from home. It was also proved that intoxicating liquor was then and there kept for illegal use and sale; that the defendants were husband and wife all the time laid in the indictment, and the husband was the owner of the premises, and kept them as a hotel, and was in and about the same most of the time, attending to and supervising his business; that he alone purchased and placed in the hotel all the liquors kept therein; that Mrs. Tryon lived with him in the hotel as the home of them and their family, having no other place of residence; and that the keeping of the house was the business of the husband, who had full and entire control thereof. There was also evidence of declarations of the wife in which she said substantially that she had thoroughly weighed the subject of the sale of intoxicating liquor, and that they had concluded to sell so long as they kept the house; and that she also said, not in the presence of her husband, 'We do sell; and what are you going to do about it?'" This was all the evidence in the case.

The judge refused a request of the defendants for a ruling that the evidence would not warrant their conviction; and instructed the jury to the contrary. A verdict of guilty was returned against both defendants; and they alleged exceptions.

A. J. Waterman, (*I. Sumner* with him,) for the defendants.

C. Allen, Attorney General, for the Commonwealth.

Gray, J. The law is clear that a husband and wife may be jointly indicted, and, upon sufficient proof, both convicted. *Commonwealth* v. *Murphy*, 2 Gray, 512, 513. Such convictions upon such indictments have been sustained for keeping a bawdy-

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house or a common gaming-house. *Regina* v. *Williams*, 1 Salk. 384, and 10 Mod. 63. *The King* v. *Dixon*, 10 Mod. 335. The offence of keeping a common nuisance by maintaining a house used for the illegal sale and illegal keeping of intoxicating liquors has no peculiarity to distinguish it in this respect, for the wife may take an active part in its management. Indeed keeping a house resorted to for purposes of prostitution or illegal gaming might be punished under the very statute on which this indictment is founded, or such resorting might even under proper allegations be given in evidence in the same case as the mode of use charged in this indictment. *Commonwealth* v. *Davis*, 11 Gray, 48. *Commonwealth* v. *Taylor*, 14 Gray, 26. The guilt of the wife might be shown by evidence of her participation in the offence charged by acts done in the absence of her husband and not appearing to have been done by his coercion. *Commonwealth* v. *Murphy*, above cited. *Commonwealth* v. *Feeney*, 13 Allen, 560. The proof in this case of the wife's being in the house, and of her acts and declarations in the husband's absence, was sufficient to warrant the jury in convicting her; and it is not denied that he was properly convicted.

Exceptions overruled.

COMMONWEALTH *vs.* JOHN H. THOMPSON & another.

On the trial of a joint indictment of a man and woman for adultery with each other, which charges that at the time of the offence she was the wife of another man, her admission, in her paramour's absence, that she was so, is not competent evidence against him.

INDICTMENT of John H. Thompson and Harriet Pitkins jointly for adultery with each other at Williamstown on August 4, 1868. The first count charged both of them with being married at the time, and not to each other. The second count charged only Harriet with being so married.

At the trial in the superior court, before *Reed*, J., there was evidence that at the time charged both parties were married and

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not to each other, but the evidence that Harriet then had a husband living consisted solely of her own declarations not made in John's presence. The defendants' counsel requested a ruling that declarations so made by Harriet could not affect John; and the judge instructed the jury "that as a general proposition this was true, but that, if they should find that the female defendant had made a declaration that at the time in question she was a married woman, and if, believing this declaration, they should find that she was a married woman, then, notwithstanding such declaration was made in the absence of Thompson, they would find both parties guilty of adultery, if they should also find the act of intercourse as charged."

The jury returned a general verdict of guilty, after which the attorney for the Commonwealth entered a *nolle prosequi* as to the first count; and the defendants alleged exceptions.

A. J. Waterman, for the defendants.

C. Allen, Attorney General, for the Commonwealth.

Hoar, J. No ground of exception being suggested to the evidence upon which the female defendant was convicted, there must be judgment upon the verdict against her. But the exception taken by the defendant Thompson seems to us well founded. The second count charged him with the crime of adultery by criminal intercourse with another man's wife. The prosecution were therefore required to prove that the woman with whom the adulterous intercourse was had was married to another man. Her confession of this fact was evidence against herself; but her admissions were very clearly not evidence against another person. They were not upon oath, and the defendant Thompson had no opportunity to cross-examine her upon them.

The provisions of the statute relating to the evidence of marriage do not include this case. Gen. Sts. *c.* 106, § 22. The admission of the fact by the party against whom the process is instituted, general repute, cohabitation, or any other circumstantial or presumptive evidence from which the fact may be inferred, is made competent thereby. But the admission of another person, though charged with a crime in the same indictment, is not made competent, and it would be contrary to the element-

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ary principles of justice to allow it. The circumstantial or presumptive evidence referred to must be evidence accompanying or preceding the fact to be proved, and not a mere subsequent declaration or admission of another than the defendant, which is only hearsay. The fact that the man and woman are charged with a joint offence, and in the same indictment, does not give to either the power to affect the other by a confession of any material part of the charge.

Exceptions of the defendant Thompson sustained.

HEMAN LAFLIN *vs.* GEORGE C. CROSBY.

The sale on execution, under the Gen. Sts. *c.* 103, § 39, of the judgment debtor's "right of redeeming mortgaged land" does not pass any interest, not covered by the mortgage, which he has in the land, and of which he retains the legal title.

A judgment debtor, owning the fee of land, mortgaged a life estate therein. His right of redeeming the mortgaged premises was taken and sold on execution, under the Gen. Sts. *c.* 103, § 39. *Held*, that the sale did not cover his reversion in fee after the life estate.

WRIT OF ENTRY. Plea, *nul disseisin*. In the superior court, the facts were agreed in substance as follows:

On February 9, 1856, the tenant, being owner in fee of the demanded premises, executed to Elizabeth D. Sedgwick the mortgage thereof which was the subject of the action of *Sedgwick* v. *Laflin*, reported 10 Allen, 430, in which it was adjudged that "the estate granted by this mortgage terminated with the life of the mortgagee," who died September 9, 1862.

"On June 17, 1861, upon an execution in favor of John O. B. Ford, executor of the will of John O'Brien, the right in equity of said Crosby was duly sold to said Ford," and "a deed of said right in equity was duly made [to Ford] by the officer who made the sale," "and said Ford had and took no possession of said premises except such as he had acquired by virtue of said deed, execution and sale thereon."

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"On July 13, 1861, said Ford made, executed and delivered his deed of the premises to the demandant;" and the demandant "on April 7, 1867, made a formal and peaceable entry upon the said premises, claiming to be the owner thereof; said entry being made in the absence of the tenant Crosby, and without his knowledge or consent. And said Crosby has occupied the premises from the time of giving said mortgage to the bringing of this action, claiming possession."

Judgment was ordered for the demandant; and the tenant appealed.

I. Sumner & J. Dewey, Jr., for the demandant.

H. C. Joyner, for the tenant.

Hoar, J. The question what constitutes the equity of redemption of a mortgage of an estate for life, when the mortgagor owns the reversion in fee, which must be settled in order to determine what may be sold to satisfy an execution against him, is a new one in this Commonwealth. The demandant contends that all the estate in the land remaining in the mortgagor may be lawfully sold; while the tenant claims that it is only the equitable interest in the precise estate mortgaged which the statute provides for appropriating in this manner to the satisfaction of the debt.

The general mode of appropriating the land of a debtor to the payment of the debt is by a levy upon it in the mode prescribed in Gen. Sts. *c.* 103. The first section of the chapter makes that method applicable to "all the lands of the debtor in possession, remainder or reversion, and all his rights of entry into lands and of redeeming mortgaged lands." The provision for a sale is in § 39, and is as follows: "All rights of redeeming mortgaged lands mentioned in section one, may, if the creditor prefers it, be sold on the execution in the manner hereinafter provided."

On a careful consideration of this provision, the court are all of opinion that by the phrase "the right of redeeming mortgaged lands" is meant the debtor's equitable interest in the estate which is mortgaged; and that any interest which the debtor has in the lands, and of which the legal title remains in

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him, not covered by the mortgage, can only be taken by a levy in the usual mode, and is not the subject of a sale.

It is obvious that, if the debtor owns a tract of land, and mortgages a part of it, the rest of the land, not covered by the mortgage, cannot be sold as constituting a part of his equity of redemption. In the case at bar, by mortgaging an estate for life, he has divided his estate into two parts — a life estate, and a reversion. His reversion is not covered by the mortgage, and therefore his title to it is not an equity of redemption. His reversion remains the same, and is not affected by whatever happens to the mortgage. If the mortgage should be foreclosed, he would not be deprived of it. If he should convey his whole equitable interest in the life estate which he had mortgaged, the purchaser of that interest alone could redeem the mortgage, and the owner of the reversion could not interfere to prevent a foreclosure. A release by the mortgagor to the mortgagee of his equity of redemption would only give the mortgagee an absolute title to the life estate, and would pass no interest in the reversion. We therefore think that the sale of the equity of redemption of the mortgaged life estate gave no interest in the reversion; and, the life estate having expired, the equity of redemption expired with it, so that the demandant has no title on which he can maintain his suit.

Judgment for the tenant.

LUCY M. CHENEY *vs.* ABIEL H. PEASE & others.

B. owning, on the west side of a road, a tract of land on which stood his house and barn, conveyed by deed of warranty to L. C. a lot of it, south of the house and barn, "together with the privilege of taking water from my aqueduct" to the granted premises. The aqueduct used by B., beginning at a spring on land of H. east of the road, ran through H.'s land, and then through land of F., to the road, which it crossed; then entered B.'s tract at a point south of his house; continued westerly to an outlet which supplied the house; then ran to another outlet at the barn; and was laid in the lands of H. and of F. under oral licenses, for which no consideration was paid. From the outlet at the barn L. C. drew water. After B.'s conveyance to L. C., H., whose land reached to the road at a point north of the land of F., conveyed to B. the right to take water from that spring, or another near it, "with the same sufficiency of water as he now has,"

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and "carry the same by aqueduct in a direct line through H.'s land to B.'s premises, as B. now does, or through H.'s land the whole distance to the road." B. then conveyed to R. his whole tract of land, with "all the right of conducting water from a spring which I have obtained from H.," excepting however expressly from this conveyance, the lot included in his deed to L. C., and "the privileges therein contained." R. divided the tract into lots, and sold one of them, including B.'s former barn, to R. C.; and sold to P. another lot, (including B.'s former house and the outlet which supplied the house with water,) together with all B.'s right of conducting water from a spring on the land of H., subject, however, to the right which B. conveyed to L. C. P. then sold the house lot to X., without any right in the springs or aqueduct. F., after all this, sold his land; and his grantee revoked the license under which the aqueduct was laid through it, and dug up that portion of the pipes. R. C. and L. C. thereupon laid a new aqueduct from the spring, over a new route, which ran wholly through the land of H. to the road, which it crossed at a point north of the house lot, then entered P.'s land, and, turning, ran southerly and across the house lot to the original outlet at R. C.'s barn. In a suit in equity by L. C. to restrain P. from digging up the portion of this new aqueduct which crossed P.'s land, "assuming that B.'s deed conveyed to L. C. an interest in the spring itself and in the aqueduct by which the water was conducted to the premises of B., so as to entitle L. C. to maintain and keep the aqueduct in repair in case the general owner should fail to do so, and to have her remedy against any one who should interrupt her in doing this," *Held*, that her right in the spring, and in the conducting of water from the spring, was only a right to share with her grantor, or those having his estate, in the limited quantity of water which was conducted from the spring in his aqueduct; and did not include a right to lay a new aqueduct to the spring for her separate use. *Held, also*, that for any failure of her grantor's title in the spring, or in his aqueduct, her remedy was by action on the covenants in his deed.

BILL IN EQUITY for an injunction on the defendant Pease against digging up an aqueduct which the plaintiff, Lucy Maria Cheney, laid across his land in Lee, and to enforce the plaintiff's right to maintain the aqueduct as against the various proprietors of lands through which it was laid, who were all made defendants. Issue being joined on their answers, the case was referred to a master to hear the parties and report the evidence; was reserved, by the chief justice, on the bill, answers and master's report, for the determination of the full court; and is stated in the opinion.

A. J. Waterman, for the plaintiff.

M. Wilcox, for the respondents.

WELLS, J. The pleadings and other papers in this case are voluminous; and the facts reported by the master are somewhat complicated. The following statement contains all that is material to the questions to be determined.

In November 1852 the plaintiff purchased a house lot from

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Horace Blood, whose deed of warranty contained this clause: "together with the privilege of taking spring water from my aqueduct to said premises." This house lot was part of a tract of twenty acres then owned by Blood upon the west side of the highway. His own house was upon the same tract, at some distance north from the plaintiff's lot. The aqueduct then in use led from a spring of water, upon land of Ransom Hinman, at considerable distance from the road, upon the opposite side; and ran part of the way in land of said Hinman, and partly in land of one Fuller; thence across the road to a point near the south side of Blood's house, and thence to a barn further to the south and west. The aqueduct, (of logs, with a bore of one and a half inch,) had been laid in 1843 "by permission of and license from said Hinman and Fuller, without any writing and without any payment of any consideration." The land of Fuller extended, upon the east side of the road, northerly to a point considerably beyond the house of Blood, and north of the south line of land, part of Blood's twenty acre tract, now owned by the defendant Pease. Opposite the northerly portion of Blood's tract the Hinman land bounded upon the road.

In 1853 Hinman conveyed to Blood the right "to take water from the spring on our land where he now takes it, or from a spring a few feet north of it, with the same sufficiency of water as he now has, and carry the same by aqueduct, in logs or lead pipe, under ground in a direct line through our land to his premises as he now does, or through our land the whole distance to the county road, provided he does no unwarrantable damage by so conducting it, and keep said spring in a good condition for us to use at all times."

Blood subsequently in 1853 conveyed to Hall and Rogers the whole tract, "reserving and excepting from the above one half an acre of land which I have heretofore deeded to Maria Cheney, the wife of Jesse Cheney, and the privileges therein contained." The deed conveyed "also all my right, grant, permission and privilege of carrying and conducting water from a spring or springs which I have obtained from Ransom Hinman, the terms and restrictions as contained in their written instrument to me according to the tenor thereof."

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Several portions of the tract have been conveyed to various parties, and the present owners are made parties to the bill. In 1864, Hall and Rogers conveyed eight acres, being the northerly part of the tract, to the defendant Pease; also "all the right, grant, permission and privilege of carrying and conducting water from a spring or springs of water on land now or late of Ransom Hinman and his wife, according to the terms of a deed from Horace Blood;" "subject to the right which said Horace Blood conveyed to the wife of Jesse Cheney." Pease had been in possession since 1855 under a contract for the purchase. This conveyance included the dwelling-house occupied by Blood when he owned the land, and the place where he took water from the aqueduct for the use of his house; but did not include the barn and the place where water was taken out for the barn, and from which the plaintiff took water in 1863 and until the interruption in 1866. The lot upon which this barn and penstock were is now owned by R. B. Cheney; having been conveyed by Hall and Rogers previous to their deed to Pease. Said R. B. Cheney has acted in conjunction with the plaintiff in asserting their right to take the water of the spring and conduct it to their several premises. Pease afterwards sold the Blood house and house lot to one Cobb; so that his south line is now a few rods north of that house. In his deed to Cobb he reserved and excepted all the rights, grant and privilege which had been and were then connected with said house lot in said springs and in the taking, carrying and conducting water therefrom to and upon said house lot.

In 1866, the portion of the aqueduct across the Fuller lot having been interrupted and taken up by Fuller's grantee, and permission to maintain it there having been refused, the plaintiff and R. B. Cheney attempted to conduct the water by a new route leading from the spring to the highway wholly over the Hinman land, (which was then subdivided and held by other parties,) thence across the highway upon the land of Pease, part of the Blood tract, and thence across his land and that of Cobb to the original outlet, upon Cheney's lot. For the interruption of the aqueduct, thus newly laid, and to enforce the right to

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lay and maintain it upon this substituted route, this bill is brought.

The plaintiff contends that Blood's deed conveyed to her an interest in the spring itself, and in the aqueduct by which the water was conducted to the premises of Blood, so as to entitle her to maintain and keep the aqueduct in repair, in case the general owner should fail to do so; and to have her remedy against any one who should interrupt her in doing this. For the purposes of the present inquiry we may assume that the words of the deed would be sufficient to give her such rights.

In construing such a grant there are two rights, of different character, to be considered; first, the right to take the water of the spring; second, the aqueduct, or means of conducting it. As to the first, the grant being of a right to take water from an aqueduct in actual existence and use at the time, the capacity of which was limited to a certain volume, the right of the grantee must be construed with reference to that limit. Within that limit it is to be exercised only as a right in common with the grantor. It is not a general right in the spring; but a right to share in a limited supply of water, brought from the spring by an aqueduct. Second, as to the means of conducting the water; by the terms of the deed the grantee is to take it from the grantor's aqueduct. If therefore the plaintiff's right reaches to the spring itself, it is only through the common aqueduct. If she may maintain and keep in repair an aqueduct from the spring to the land which was Blood's, it must be that aqueduct in which the common right exists. Her grant cannot be so extended as to give her a right, independently of the grantor and those taking his estate, to lay a new aqueduct for her own separate use, and to take water from the spring separately.

If the grantor's title prove defective, or if his right to maintain the line of his aqueduct be defeated, the grantee may have a remedy upon the covenants in her deed. But such failure would not entitle her to transfer the exercise and enjoyment of the rights, for which she contracted, to another locality where her grantor might happen to have a better title. If Blood had not succeeded in procuring a title to the spring, it would not be

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supposed for a moment that the plaintiff could supply herself from any other spring which she could find upon land that Blood did own. The failure of Blood's right to maintain his aqueduct stands upon the same footing. The plaintiff's grant of a right to take water from Blood's aqueduct does not entitle her, upon failure of that aqueduct from defective title, to establish another wherever Blood had title or a right to maintain one, at the date of his grant, and to take water in like manner from that. Such substitution can be effected only by the concurrence and adoption of all parties in interest at the time it is made. It can be derived as a right neither from the grant, nor from the covenants of warranty. It does not aid the plaintiff's claim to consider the privilege which Blood enjoyed, or the right which he afterwards acquired, as appurtenant to the whole tract, and therefore capable of passing with each separate parcel, upon subdivision of the tract. The owner may nevertheless convey parcels without any share in the easement; or with such limited and restricted right as he sees fit. The designation of a special and limited right, in the plaintiff's deed from Blood, is an exclusion of the larger, general right.

The plaintiff relies upon the fact that, after Blood's deed to her, he procured from Hinman a grant of the right to cross that land by either route; and claims the right to avail herself of this subsequent deed by way of estoppel; that is, that Blood having failed to secure a right to conduct the water by the original course, and having acquired a right to conduct it by another course, the plaintiff's grant may attach to that right, as the only one which can be used. But such is not the operation of an estoppel. It does not extend the terms of a grant, nor make it apply to new subject matter. It prevents the party from setting up the title subsequently acquired against his previous deed. Having acquired title afterwards, his deed estops him from denying that he had the same title when giving it. But the estoppel gives to the deed no other or greater effect than it would have had if the grantor had held at the time all the title which he afterwards acquired. The extent of the plaintiff's rights must be determined by the terms of her own deed, and

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not by the extent of right which her grantor then had or afterwards acquired. That deed, as we have already seen, conveyed no general right, either in the spring or to cross intervening lands. At most it could only confer a right to maintain the aqueduct from which it gave a right to take the water.

The plaintiff cannot therefore maintain her bill against McDermott and Foster, grantees under Hinman; and this would be sufficient ground for dismissing it as to all, because a right to cross land of Pease would be unavailing to her, for the enjoyment of her right to the water, without a right also to cross the lands of McDermott and Foster. But the plaintiff equally fails to show any right to cross the land of Pease. The considerations already adverted to are sufficient to show that no such right results from her original grant. The conveyance to Pease of all rights which Blood had in the aqueduct, spring and privilege of conducting the water, and the reservation therefrom of the rights conveyed to the plaintiff, did not operate to subject Pease's land to any burdens except such as were imposed by the terms of the grant to the plaintiff. That grant imposed no burden upon the land retained by Blood, beyond the maintenance of the aqueduct as it then was, and the right to conduct water from it, over intervening land, to the plaintiff's lot. It imposed no burden then, in her favor, upon land lying north of Blood's house lot; and the reservation of her right, in the deeds under which Pease claims, cannot be held to extend that right beyond what it was before. *Bill dismissed, with costs.*

WOLCOTT D. F. PUTNAM & others *vs.* MUNROE GLEASON.

A testator devised "to my daughters P. and G., for the term of their natural lives, all my real estate, to be held by them to their own use and behoof during life, as tenants in common, and at their death to their heirs and assigns." *Held*, that G. took, by the Gen. Sts. c. 89, § 12, a life estate in an undivided half of the real estate, the remainder in which half was contingent until her death, when it vested in those who were then her heirs at law; and that no proceedings in a suit for partition between the tenants for life could affect the question in whom such remainder should vest.

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WRIT OF ENTRY, submitted for the determination of the full court on agreed facts, the substance of which appears in the opinion.

J. S. Page, (of Illinois,) for the demandants.

H. L. Dawes & T. P. Pingree, for the tenant.

FOSTER, J. The determination of this cause depends upon the construction of the second clause in the will of Henry Putnam, namely: "I give, devise and bequeath to my two daughters, to wit, Julia, wife of Phinehas L. Page, Martha A., wife of Munroe Gleason, for the term of their natural lives, all my real estate of every name and nature, and wherever situated, to be held by them to their own use and behoof for life, as tenants in common, and at their death to their heirs and assigns forever."

The question is, who are entitled to the remainder after the life estate of Mrs. Gleason (who has died leaving no children, and whose husband is the tenant in this real action)? The demandants are Mrs. Gleason's heirs at law, her brothers and sister, the surviving children of Henry Putnam, the testator.

It is beyond reasonable doubt that Mrs. Gleason took only a life estate in the undivided half of her father's real estate, by virtue of the Massachusetts statute abolishing the rule in *Shelley's case*, "When lands are given by deed or will to any person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only in such first taker and a remainder in fee simple in his heirs." Gen. Sts. *c.* 89, § 12.

The devise under consideration is plainly one of the cases contemplated by this statue. The grave question is, whether the remainder is vested or contingent. The demandants contend that the remainder vested only upon the death of Mrs. Gleason in such persons as were then her heirs at law. And such is the construction which we adopt. "A remainder is contingent whilst the person to whom or the event upon which it is limited to take effect remains uncertain." 4 Kent Com. (6th ed.) 208, note. The present case is Fearne's fourth, or Blackstone's second, class of contingent remainders, namely, "a remainder limited to a dubious and uncertain person." At common law, by

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virtue of the rule in *Shelley's case*, Mrs. Gleason would have taken an estate in fee; and no such question as the present could have arisen. But the operation of our statute is to reverse this rule, "and make it a life estate in the first taker, with a contingent remainder to his heirs; contingent because *nemo est hæres viventis*, and the heirs of such life tenant cannot be ascertained till his death." *Barton* v. *Bigelow*, 4 Gray, 357.

The case most resembling the present to be found in our reports is *Richardson* v. *Wheatland*, 7 Met. 169, in which the principles by which we must be guided are fully expounded. Undoubtedly the law favors vested rather than contingent remainders; but not to the extent of disregarding the intent of the testator, or rejecting the natural import of the language he has used. *Blanchard* v. *Blanchard*, 1 Allen, 223, and *Abbott* v. *Bradstreet*, 3 Allen, 587, two recent cases in which remainders were held to be vested and not contingent, were both limitations after the life estate to the children or heirs of the testator himself.

The word "heirs" in a will has sometimes been construed to mean children. But such is not its ordinary legal signification; and, being a technical word, it must be construed according to its well defined legal meaning, unless there is something in the context of the will which satisfies the court that the testator used it in a different sense. We find nothing in this will to indicate an inability to use technical language with precision; or an intention that the phrase "heirs" should receive any peculiar and special construction. Nor does the result of holding that the remainders after life estates of the two daughters were contingent, and vested only upon the death of each in those then proving to be her heirs, appear in any respect to contravene the general design of the testator in the distribution of his property.

The proceedings in the suit for partition between the tenants for life cannot possibly affect the question who are the persons in whom the contingent remainder shall vest.

Judgment for the demandants.

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Francis Bainway *vs.* George H. Cobb.

A stone sink, weighing two hundred or two hundred and fifty pounds, set, by the owner of a dwelling-house, closely against the walls, in a corner of one of the rooms, in a frame, under the spout of a wooden pump connected with a cistern of water below, (which pump soon afterwards was removed,) was used for washing dishes and other appropriate domestic work; the waste water being conducted from one end of it, by a lead pipe, through the side of the house, into a drain, until the pipe wore out, and being afterwards dipped out, or drawn off through a hole fitted with a stopple. *Held*, that it was not severed from the freehold by the removal of the pump and decay of the pipe, no change being made otherwise in its position or use; and passed to the heir as against the administrator, on the death of the owner of the freehold, intestate.

Tort for the conversion of a stone sink. At the trial in the superior court there was evidence of the following facts:

The sink, which weighed about two hundred or two hundred and fifty pounds, was put by Hiram Cobb, twenty-five or thirty years ago, in the corner of a room, over a cistern, in the house owned and occupied by him in West Stockbridge; rested upon a wooden frame next the sides of the room, without being nailed or fastened to the house, except that a lead pipe ran from a hole at one end under the sink through the side of the house into a stone drain constructed for the purpose of carrying off the waste water: and he put a wooden pump into the cistern, with the outlet leading over and into the sink. The pump, not working well, was soon removed, after which water was drawn from the cistern in a bucket. The lead pipe remained until it wore out, and was then taken away, and a stopple used in the sink and the waste water drawn or dipped out. The sink remained in the same place, and was used for washing dishes, and in doing any other necessary or appropriate work of housekeeping, until after his death in 1862, when the defendant (who was his only son and sole administrator) and his other children and heirs at law met together and agreed upon a settlement and division of his property among themselves, by which the household furniture was given to one of his daughters, and his real estate and other personal property was afterwards conveyed to the defendant. After the division, and before the conveyance to the de-

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fendant, the plaintiff bought the sink from that daughter, and with her assistance removed it from the premises, leaving an unpainted strip on the sides of the house where the sink and frame had rested and pressed against them; and the defendant demanded and took the sink, and returned it to its old place, claiming it as part of the real estate.

Rockwell, J., instructed the jury that, if they believed all the evidence, in law the sink was personal property, and not a fixture. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

A. J. Waterman, for the defendant.

H. J. Dunham, for the plaintiff.

Gray, J. Upon the facts stated in the bill of exceptions, we are unanimously of opinion that the stone sink was annexed to and became part of the freehold of Hiram Cobb. This is shown by the purpose and the mode of placing it on the premises. In *Park* v. *Baker*, 7 Allen, 78, which is relied on to support the ruling of the court below, the ice chest held to be a chattel was not an article which necessarily or usually forms part of the fitting up of the house itself, and was expressly agreed to have never been in any way connected with or affixed to the building. But the sink in this case, if not absolutely necessary to the completeness of the dwelling-house, was not only by its construction and position obviously adapted and intended to be, as it afterwards was in fact, used daily for the ordinary domestic work; but it was fitted in a frame, and set closely in the corner and against the sides of the room, over a cistern of water; was so heavy as to require no other fastening to keep it in place; and was originally connected by a pump with the cistern under it, and by a pipe, passing through the side of the house, with a stone drain to carry off the waste water. The removal of the pump and the pipe, without otherwise changing the position or the use of the sink, did not sever it from the freehold or make it personal property again.

If it had been annexed by a tenant for years, he might have disannexed and removed it during his term, and not afterwards; but, subject to that right of removal, it would have been real

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estate; and the law is more favorable to the heir as against the executor, both claiming under the same absolute owner of the estate, than to the landlord as against his tenant, who has paid for the occupation of the premises and himself put in the fixtures in question. *Grymes* v. *Boweren*, 6 Bing. 437, and 4 Moore & Payne, 143. *Wall* v. *Hinds*, 4 Gray, 256. *Bliss* v. *Whitney*, 9 Allen, 114. *Kutter* v. *Smith*, 2 Wallace, 491. *Blethen* v. *Towle*, 40 Maine, 310. *Hays* v. *Doane*, 3 Stockt. 84. This sink, having been annexed to the freehold by the owner of the fee, and not severed before his death, descended to his heirs as real estate, and did not devolve upon his administrator and next of kin as personal property. It was not therefore included in the household furniture given up by the other children to the daughter under whom the plaintiff claims, but continued to be real estate, to which she as one tenant in common could not make a good title as against the others, and which passed to the defendant by the deed from his coheirs. *Exceptions sustained.*

DANIEL J. HICKS *vs.* MICHAEL MCDONNELL.

An award of arbitrators appointed by rule of court, if made while the record shows that another person had been substituted in the place of one of them, cannot be accepted, although their proceeding was by agreement of the parties and sanctioned by the court, without that fact appearing also of record.

APPEAL from the disallowance of exceptions by the superior court. This was an action of tort in the superior court; and the record showed that at June term 1867 by rule of court under agreement of the parties it was referred to Jarvis Rockwell, Russell C. Brown and Nahum P. Brown for determination; that at February term 1868 Lorenzo H. Gamwell was substituted as arbitrator in the place of Rockwell; that at June term 1868 an award by the three arbitrators first named was filed, dated June 16, 1868, on which day they met and heard the parties; that on motion of the plaintiff this award was accepted by the

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court; and that a subsequent motion of the defendant to set it aside, for the reason that the hearing was not had before Gamwell but before Rockwell as one of the arbitrators, was overruled and the defendant's exceptions to the order overruling it were disallowed.

J. C. Wolcott, for the defendant.

F. O. Sayles, for the plaintiff.

HOAR, J. The award of the arbitrators to whom the rule of court issued could not be accepted while the record showed that another person was substituted in the place of one of them. If the proceeding under the rule first issued was by the agreement of the parties and sanctioned by the court, the record should be amended to show that fact before the award should be accepted.

Acceptance of award set aside, and case remitted for further proceedings.

FELIX F. PETITCLER *vs.* GEORGE S. WILLIS.

In an action pending in the superior court, in which the plaintiff of record disclaims the use of his name, and which is continued in court only on the assumption that another person is entitled to sue in such plaintiff's name to enforce a claim belonging equitably to himself, an order for an indorser may properly be directed to such other person.

The right of the superior court, under the Gen. Sts. c. 129, § 29, to require the plaintiff, in any case pending therein, to procure an indorser, is not subject to revision by this court.

APPEAL from the disallowance of exceptions by the superior court. This was an action of tort against the former sheriff of Berkshire, prosecuted in the superior court by John C. Wolcott, (assuming to be attorney for the nominal plaintiff,) who placed an indorsement upon the writ before service, directing the defendant to "take notice that the claim and demand in this case belongs to John C. Wolcott, and no other person holds any right or interest in the same." It appeared further by the record that the plaintiff of record filed a disclaimer of the use of his name and a denial of Wolcott's authority to act as his at-

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torney, and the court ordered Wolcott to furnish an indorser of the writ other than himself, to the satisfaction of the clerk, within a certain time, and that the action should be dismissed if this should not be done; that the time elapsed without the compliance of Wolcott with the order; and that the action was dismissed accordingly, to which dismissal he alleged exceptions, which the court disallowed.

J. C. Wolcott, pro se.

J. M. Barker, (*T. P. Pingree* with him,) for the defendant.

FOSTER, J. The order to furnish an indorser was properly directed to Wolcott, the real party in interest, by whom alone the suit was prosecuted. The nominal plaintiff had upon the record disclaimed Wolcott's right to use his name, and the action could be continued in court only upon the assumption that Wolcott was, as he claimed to be, entitled to use the name of the record plaintiff to enforce a claim equitably belonging to himself.

The court in its discretion may in any case require an indorser, and the propriety of the exercise of such discretion cannot be revised by this court. Gen. Sts. *c.* 129, §§ 29, 32.

Judgment dismissing the action affirmed.

LUCY FRARY *vs.* WALTER STERLING.

An oral promise of a mortgagee of land, at the time of entering for foreclosure, that if he shall sell "the place" he will pay to the mortgagor whatever he shall receive for it beyond the amount due on the mortgage, is within the clause of the statute of frauds which provides that no action shall be brought upon any agreement that is not to be performed within one year from the making thereof, — Gen. Sts. *c.* 105, § 1, *cl.* 5.

CONTRACT to recover a balance of the price of land sold by the defendant.

At the trial in the superior court, before *Rockwell*, J., these facts appeared: The plaintiff on July 25, 1853, mortgaged land in West Stockbridge to the defendant to secure the payment on

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or before July 1, 1856, of $600 which she borrowed from him. On July 22, 1856, the defendant made an open and peaceable entry upon the premises on account of breach of the condition of the mortgage and for the purpose of foreclosure; and the plaintiff on the same day signed upon the back of the mortgage, and acknowledged before a magistrate, a certificate of such entry. On July 22, 1859, the title of the defendant became absolute under the foreclosure; the plaintiff having failed to make any payment on the mortgage note except the first year's interest. In May 1864, the defendant sold the land for $1350, which was more than the arrears of the plaintiff's debt; and the plaintiff, to sustain her claim to the surplus, "introduced evidence to prove that she signed the certificate upon the agreement, consideration and condition that, if the defendant should sell the place, he would pay to her whatever he should receive for it, after deducting the amount, principal and interest, of his mortgage, to the time of sale, and all necessary charges and expenses." The defendant objected to the introduction of this evidence, because the agreement, being oral, was within the statute of frauds; the judge overruled the objection; the verdict was for the plaintiff; and the defendant alleged exceptions.

M. Wilcox, for the defendant.

T. P. Pingree & J. M. Barker, for the plaintiff.

Gray, J. The defendant relies upon that clause of the statute of frauds which provides that no action shall be brought "upon any agreement that is not to be performed within one year from the making thereof," unless the agreement or some memorandum or note thereof is in writing. Gen. Sts. *c.* 105, § 1, *cl.* 5. It is true that the statute does not cover an agreement which may be fully performed within the year, although in some contingencies it may extend beyond that period. *Roberts* v. *Rockbottom Co.* 7 Met. 46. *Doyle* v. *Dixon*, 97 Mass. 209. But an agreement which cannot be performed according to its terms within a year is within the statute, even if the act or promise which is the consideration for it may be performed within the year, or has been actually performed. *Lapham* v. *Whipple*, 8 Met. 59. *Marcy* v. *Marcy*, 9 Allen, 8.

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The agreement which the plaintiff offered to prove by oral evidence was, that the defendant, at the time when the plaintiff gave him possession for the purpose of foreclosure of the land which she had mortgaged to him, promised that, if he should sell "the place," he would pay her whatever he should receive for it beyond the amount due on his mortgage, principal and interest. This agreement looked to a sale of the land, and not merely of his mortgage title therein, as is apparent equally from the use of the words "the place," and from the consideration that, if the mortgagee should sell only his own title before foreclosure, it could not be expected to sell for more than the amount due on the mortgage. It was not contended that the plaintiff by the agreement gave the defendant any direction or authority to sell her equity of redemption, and the foreclosure would not be complete, so that he could sell the whole estate without her consent, until the expiration of three years. Gen. Sts. *c.* 140, § 1. His agreement therefore could not, according to the only reasonable construction of its terms, be performed within one year, and the case is within the statute of frauds.

Exceptions sustained.

NORMAN SPURR *vs.* CALEB BENEDICT.

The owner of a lot of forty-five acres of woodland, bought by him under a mistake as to its location, which mistake he had not discovered, stated, in negotiating a sale of it, that it was situated in the town of S., was all dry land and almost all accessible to teams, and would cut from fifteen to eighteen cords of wood per acre; when in fact it was situated in the town of G. B., a hundred and thirty rods from the boundary of S., included a swamp more than an acre in area and some ledges of rock inaccessible to teams, and would cut in no part more than fifteen cords of wood to the acre, and in some parts not more than five cords. He further represented that it adjoined a good wagon road and a cleared field, and showed to the buyer's agent a tract of six or eight acres as belonging to it, which adjoined such a field and a public highway; when in fact it did not include this tract, and no part of it adjoined a cleared field, or any road except a wood road. Under the influence of these misrepresentations the sale was completed by the buyer's giving his note for the purchase money and taking a deed of the lot on the face of which there was nothing to show that the land shown was not identical with the land conveyed. He would not have made the purchase if he had known the truth about the land; and, upon discovering it, he offered to reconvey the lot to the seller, and demanded a return of his note;

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with which demand the seller refused to comply, and put the note in suit. *Held*, that the buyer was entitled to a perpetual injunction on the seller against prosecuting the action on the note; although the misrepresentations of the seller were made without the purpose of deceit, and the deed he gave was a mere deed of quitclaim without any covenant of title or warranty.

BILL IN EQUITY for an injunction on the defendant against prosecuting an action at law on a promissory note of the plaintiff, and for general relief in the matter of a purchase of land by the plaintiff of the defendant. The case was referred to a master, who found the facts hereafter stated; and was reserved on his report, by *Gray*, J., for the determination of the full court.

In the autumn of 1864 the defendant entered into a negotiation to buy from Sarah Wheelock a lot of forty-five acres of woodland, situated near the boundary line between Sheffield and Great Barrington; employed Lyman M. Merryfield, who owned land adjoining, to point out the lot to him; and took a deed from Wheelock, dated October 17, 1864, supposing that it covered all the land pointed out by Merryfield; when in fact Merryfield was mistaken as to the boundaries of Wheelock's lot, and had pointed out to the defendant, as a part of it, some land adjoining a cleared field and an old public road, which did not belong to Wheelock and was not covered by her deed.

Later in the autumn, the defendant offered to sell the lot to the plaintiff, to whom he represented that it was situated in Sheffield, adjoined a cleared field and a good wagon road, "was all of it dry land, and very comfortable land to get timber off of," "would cut from fifteen to eighteen cords per acre," and that one "could go with a team on almost any part of it." And soon afterwards Henry Snyder, the plaintiff's agent, met the defendant, by agreement, for an examination of the land; and the defendant pointed out to him, as belonging to it, the land adjoining the cleared field and the road, "and one boundary, at least, (a large rock,) which was at some distance from his land." "As the result of this examination, it was agreed, between Snyder and the defendant, that the defendant should convey the land to the plaintiff, who should give his note to the defendant in the sum of $600." "Snyder wanted a warranty

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deed, which the defendant refused to give, but executed a quit-claim deed" without any covenant of title or warranty, "and left it with one Bradford to be delivered to the plaintiff when he should give his note for the $600; and the plaintiff afterwards called and took his deed and left the note," which was made payable on demand. "Snyder's first offer to the defendant was, 'I will give you $600 if you will survey the land out to me;' and the defendant replied, 'No, I will not do that;' and, either in this connection, or while they were upon the land, said, 'There are the minutes; you can survey it as well as I can.'"

The deed described the premises conveyed as a parcel of land in Sheffield, "being the same tract of land I purchased of Sarah Wheelock by her deed dated October 17, 1864," and referred to the Wheelock deed, or the record thereof, for a more particular description. The land which it covered was not situated in Sheffield, but in Great Barrington, a hundred and thirty rods north of the boundary line between the two towns; would not cut from fifteen to eighteen cords of wood per acre, but would cut, in part five or six cords, in part eight or ten cords, and in part twelve or fifteen cords; included some ledges of rock not accessible by teams, and also a swamp more than an acre in area; and did not adjoin any public road, but did adjoin a "wood road" along its southern boundary.

The land erroneously shown to Snyder as belonging to the lot included at least six or eight acres, would cut from twelve to fifteen cords of wood per acre, and, as above stated, adjoined an old public road (which, however, was but little used) and a cleared field.

During the ensuing winter, Snyder went upon the conveyed premises with a surveyor, to identify their boundaries, but was unsuccessful in the effort; and by the direction of the plaintiff, (who had never occupied or used the land,) he proposed to the defendant to return the deed and take back the note; but the defendant refused the proposal, and afterwards sued the note against the plaintiff; whereupon the plaintiff, who had fully discovered the mistake about the land, made tender to him of a reconveyance of the land and of indemnity against all expenses

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incurred by him in the suit on the note, and demanded of him a surrender of the note, on the ground of mistake in the contract; and upon his refusal filed this bill.

The plaintiff and Snyder were permitted to testify, before the master, against the defendant's objection, that if they had known the facts about the land, as afterwards ascertained, they would not have concluded the purchase; and the plaintiff further to testify that the fact alone that the land was situated in Great Barrington instead of Sheffield would have made a difference with him.

I. Sumner, (*J. Dewey, Jr.*, with him,) for the plaintiff.

B. Palmer, for the defendant.

Foster, J. There can be no doubt of the full equity jurisdiction of this court to set aside a conveyance of land, on the ground of mistake, where the vendor has undertaken to sell something which he did not own, and the estate embraced in the deed, although owned by him, is not that which the vendee intended to buy and supposed that he was obtaining by the conveyance. In such a case the equity for a rescission of the transaction does not depend upon any intentional fraud on the part of the grantor; and it is by no means limited to cases in which an action for deceit would lie at common law. Mistake is a head of equity jurisdiction distinct from fraud. Relief is granted on the ground that it would be unconscientious to oblige a man, who has not been himself negligent or in fault, to adhere to his bargain, and to retain property which he was induced to purchase by a misapprehension as to a material and essential circumstance, which he was led into by the conduct of the other party.

In the present instance, the defendant not only made exaggerated statements as to the value and quality of the land he proposed to sell, but he pointed out to the plaintiff's agent some land which he did not own, as embraced in the bargain, and one boundary which was at a considerable distance from the premises which he actually owned and conveyed by his deed. The land pointed out to the plaintiff's agent was of a better quality than that conveyed, would cut more wood, and corresponded

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with the description which the defendant had given to the plaintiff himself. All this appears to have been done innocently. Neither the purchaser, nor his agent, seems to have been negligent. They naturally relied on the vendor to point out the boundaries of his estate, and there was nothing in the deed to indicate that the land shown and conveyed was not the same. The defendant was himself mistaken as to what he owned, and consequently misled the plaintiff; and under the influence of this mutual error the transaction was consummated. But the prejudicial consequences to the purchaser are the same as if the conduct of the vendor had been designedly fraudulent. He has obtained, not what he expected to have, but something else which he did not intend to buy and would not have bought if he had known the truth. Of this we are satisfied, upon the report of the master; and it amounts to a case for equitable relief.

Nor is the fact that only a quitclaim deed was given any bar to the plaintiff's equity; because the mistake does not relate to the title obtained, but to the very subject matter of the contract. One parcel was bargained for and supposed by both parties to be embraced in the deed; another and different one was actually conveyed. The absence of covenants of title and warranty can make no difference; as their insertion would have afforded no protection against a mistake of this description. For a citation of the authorities, and discussion of this question, see *Earle* v. *De Witt*, 6 Allen, 520. The plaintiff has already executed and tendered a reconveyance of the estate, and is entitled to a

Decree perpetually enjoining the defendant against prosecuting the action at law pending upon the note given for the purchase money.

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STOCKBRIDGE IRON COMPANY *vs.* CONE IRON WORKS & others.

No affidavit of the amount of damages, under the Gen. Sts. *c.* 112, § 6, is necessary to give this court jurisdiction of an action in which relief in equity is prayed for.

TORT praying for relief in equity. Damages were laid in the sum of two hundred thousand dollars; but no certificate, under the Gen. Sts. *c.* 112, § 6, of any oath or affirmation of the plaintiffs, or any one in their behalf, that the damages demanded exceeded one thousand dollars in amount, was annexed to or indorsed on the writ, which was an original writ of summons and attachment. *Gray*, J., overruled a motion to dismiss the action for want of such a certificate; and the defendants appealed.

T. P. Pingree, for the defendants.

I. Sumner, for the plaintiffs.

WELLS, J. The jurisdiction of this court is exclusive over all actions in which relief in equity is prayed for. St. 1853, *c.* 371. Gen. Sts. *c.* 113, § 1. The prayer for relief gives jurisdiction of the action, and therefore no affidavit is necessary. Its character is that of a suit in equity. *Irvin* v. *Gregory*, 13 Gray, 215. Gen. Sts. *c.* 113, § 3. If a prayer for relief is improperly coupled with an action at law, it may be defeated by a demurrer. *Harvey* v. *De Witt*, 13 Gray, 536. No such question is raised by this motion to dismiss.

Decree overruling the motion to dismiss affirmed.

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Oliver N. Bostwick *vs.* James A. Bass & trustees.

An insurance company summoned as trustees in foreign attachment answered generally, denying possession of goods, effects or credits of the defendant; and to interrogatories of the plaintiff replied that they issued a policy against loss by fire on the defendant's goods in a building, and had received notice of the destruction of the goods by fire, but were informed and verily believed that the policy was avoided by a misrepresentation of the defendant, in obtaining the insurance, that the building was detached, when in fact there was a building adjoining which materially affected the risk. The plaintiff then alleged and offered to prove, under the Gen. Sts. c. 142, § 11, that the insurance was not effected upon a detached building, and that there was no adjoining building which materially affected the risk; but the judge excluded the evidence as immaterial, and ordered the trustees to be discharged. *Held*, that the plaintiff had no ground for exceptions.

Trustee process. The Western Massachusetts Insurance Company, summoned as trustees, filed a general answer denying that they were chargeable, and also answered special interrogatories of the plaintiff, who then made allegations and offered evidence on the question of charging them, which *Rockwell*, J., excluded as immaterial; to which ruling the plaintiff alleged exceptions, and also appealed from the order of the judge for their discharge. The material facts are stated in the opinion.

T. P. Pingree & J. M. Barker, for the plaintiff.

W. R. Plunkett, for the trustees.

Chapman, C. J. The trustees answer generally that, according to their best information and belief, they have not any goods, effects or credits of the defendant in their hands or possession. On being further interrogated, they admit that they issued a policy of insurance on the defendant's stock of goods in a country store, and that they have been notified of the destruction of the property by fire; but they say they are informed and verily believe that there was a misrepresentation on the part of the defendant in obtaining the insurance, sufficient to invalidate the policy, which was, that the store in which the goods were was detached, whereas in fact there was another store adjoining which very materially affected the risk. There is no doubt that such a misrepresentation is material, and invalidates a policy; and upon this state of facts the trustees are entitled to be discharged

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The statements of trustees in their answers are to be considered as true in deciding how far they are chargeable; and the additional facts which the plaintiff may allege and prove must be other facts not stated or denied in their answers. Gen. Sts. *c.* 142, § 11. The plaintiff alleged and offered to prove: 1, that the insurance was not effected upon a detached building; 2, that there was no other building, adjoining the one containing the goods destroyed and covered by the policy, which materially affected the risk. The terms of the first allegation are immaterial, because the insurance was not upon the building. But, assuming that the error is verbal merely, yet neither of the allegations relates to facts not stated or denied in the answer. Each of them contradicts statements in the answer which the trustees say that they are informed and verily believe to be true. These averments are therefore immaterial; because, notwithstanding them and any evidence which may be offered to sustain them, the court are required by the statute to consider the statements of the trustees as true.

It is not material to consider the other questions that have been argued. *Exceptions overruled.*

HARRIET C. MARTIN *vs.* MARY CLAPP.

The probate court may permit a party cited for examination on a complaint under the Gen. Sts. *c.* 96, § 6, for fraudulently concealing effects of a deceased person, to appear and be assisted by counsel in responding to the charges in the complaint and making answers to interrogatories concerning the same.

APPEAL from a decree of the probate court in the matter of a complaint of Harriet C. Martin, on the Gen. Sts. *c.* 96, § 6,*

* Upon complaint made to the probate court by an executor, administrator, heir, legatee, creditor or other person interested in the estate of a person deceased, against any one suspected of having fraudulently received, concealed, embezzled or conveyed away any money, goods, effects or other estate, real or personal, of the deceased, the court may cite such suspected person, though he is executor or administrator, to appear and be examined on oath upon the matter of the complaint. If the person so cited refuses to appear and submit to

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against Mary Clapp, for fraudulently concealing effects of Calvin Martin, the deceased husband of the complainant; which decree, after reciting that "the parties appeared with their counsel," that the respondent "claimed the right to appear and be assisted by counsel in responding to the charges against her in the complaint, and in making answers to such interrogatories as might be put to her concerning the same," and that "the complainant by her counsel objected to such appearance," ordered that the respondent might so appear and be assisted. *Gray*, J., affirmed the decree; and the complainant appealed to the full court.

T. P. Pingree, for the complainant.

E. Merwin, for the respondent, was not called upon.

WELLS, J. Proceedings under the Gen. Sts. *c.* 96, § 6, are for the purpose of discovery in a summary mode. They are not the foundation of any decree, but are merely subsidiary to some other proceeding, either in the same or some other court. The examination is wholly in writing. The judge has no occasion to scrutinize the manner or appearance of the respondent, nor to pass upon the correctness or falsity of her statements. She is not a witness, but a party, entitled to an appeal. *Arnold* v. *Sabin*, 4 Cush. 46. No supporting and no opposing testimony is received. The discovery is not only the purpose, but the end of the proceedings under the complaint.

Upon an examination under a similar provision of the insolvent laws, it was decided (*Ex parte Winsor*, 8 Law Reporter, 514, referred to in argument) that the party cited should be permitted to consult counsel before making his answers. The opinion of the court in the case of *Peabody* v. *Harmon*, 3 Gray, 113, indicates that in the examination of a creditor offering his claim for proof in insolvency the privilege of consulting counsel is a matter of discretion with the judge or commissioner, to be

examination, or to answer such interrogatories as are lawfully propounded to him, the court may commit him to the jail, there to remain in close custody until he submits to the order of the court. The interrogatories and answers shall be in writing, signed by the party examined, and filed in the probate court.

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exercised in view of the circumstances of the particular case, and the nature of the inquiry.

The reasons for regarding the privilege of counsel as the right of a party cited for examination upon a complaint under this statute are much stronger than in the case of a creditor offering his claim for proof. Whether it be an absolute right, or only a privilege to be enjoyed with the permission and at the discretion of the judge of the probate court, we are of opinion that the appeal in this case cannot be sustained. Although the privilege of counsel was claimed as a right, it does not appear to have been conceded as such. There is nothing in the case to show that it was not properly granted.

Decree of probate court affirmed.

EBER B. SHERMAN *vs.* MYRON TORREY & another.

The power to invest town officers lawfully chosen at a town meeting with any special authority which the town may lawfully confer upon them in the exercise of their official duties is incident to the power to choose them.

A specification in the warrant for an annual town meeting that it is called "to elect all necessary town officers for the ensuing year," and "to raise and appropriate such sums of money as may be necessary to defray town charges for the coming year and pay any indebtedness of the town," is sufficient, under the Gen. Sts. c. 18, § 22, to authorize the town to vote at the meeting, in conformity with the Gen. Sts. c. 18, § 73, to invest the collector of taxes then duly chosen with all the powers which a town treasurer has when appointed collector of taxes.

An officer who serves a warrant addressed to him by a collector of taxes, substantially in the form prescribed by the St. of 1785, c. 50, § 6, (Rev. Sts. c. 7, § 33; Gen. Sts. c. 11, § 39,) directing him to collect from a person named a certain sum due as his portion of a certain tax, "whereof said person has neglected to make payment and thereof is delinquent," is not liable in damages to the delinquent taxpayer on the ground that it does not appear on the face of the warrant that it was issued in the due and lawful exercise of a power or jurisdiction conferred by law.

TORT against Myron Torrey, the collector of taxes of Williamstown for the year 1866, and Samuel B. Kellogg, a deputy of the sheriff of Berkshire, for the forcible collection from the plaintiff of a tax assessed on him by the assessors of Williamstown for that year. The defendants justified under their war-

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rant from the assessors. The case was submitted for the determination of the court on agreed facts, the substance of which appears in the opinion.

A. J. Waterman, for the plaintiff, cited *Williamstown* v. *Willis*, 15 Gray, 427; *Wickes* v. *Clutterbuck*, 2 Bing. 483; *The King* v. *Chilverscoton*, 8 T. R. 178; *Amesbury Manufacturing Co.* v. *Amesbury*, 17 Mass. 461; *Preston* v. *Boston*, 12 Pick. 14; *Boston & Sandwich Glass Co.* v. *Boston*, 4 Met. 189; *Joyner* v. *School District in Egremont*, 3 Cush. 572.

W. H. Swift, for the defendants.

Chapman, C. J. It is agreed that the defendant Torrey was duly chosen collector of taxes for Williamstown; and that an assessment was duly made and committed to him for collection; and the questions presented in the case relate merely to his proceedings in making the collection.

The town voted, at its annual meeting in March 1866, "that the collector have all the powers that the town treasurer has when appointed collector of taxes." The plaintiff contends that this vote was void. It is provided by the Gen. Sts. *c.* 18, § 73, that towns may pass such a vote at a meeting notified for that purpose. The plaintiff denies that the meeting was notified for that purpose. The third article in the warrant was, "To elect all necessary town officers for the ensuing year." The fourteenth article was, "To raise and appropriate such sums of money as may be necessary to defray town charges for the coming year and pay any indebtedness of the town." The Gen. Sts. *c.* 18, § 22, provides that the warrant shall express the subjects to be acted upon, and nothing acted upon shall have a legal operation unless the subject matter thereof is contained in the warrant. But in *Haven* v. *Lowell*, 5 Met. 35, the court say that the articles in the warrant are, from the very nature of the case, general in their description, and are oftentimes inartificial in their construction; and that they are mere abstracts or heads of the propositions which are to be laid before the inhabitants for their action. Articles of such a character have been held sufficient in many cases. See *Avery* v. *Stewart*, 1 Cush. 496; *Rand* v. *Wilder*, 11 Cush. 298; *Williams* v. *School District in*

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Lunenburg, 21 Pick. 81; *Grover* v. *Pembroke*, 11 Allen, 88. The court are of opinion that the article in this case was sufficient. The subject of choosing officers includes, as an incident, any special authority that the town is authorized by statute to confer upon them in the exercise of their official duties.

It is agreed that Kellogg, the other defendant, was a deputy sheriff; and that Torrey, the collector, issued a warrant to him under which he acted. It is contended that this warrant was insufficient in form and substance to authorize him to act. It is addressed to the sheriff or his deputy, and directs them to levy, and collect of the several persons named in it, the sums stated, being the sums due from them as their respective portions of the taxes for the year 1866, "whereof said persons have neglected to make payment and thereof are delinquent." The objection to the warrant is, that it does not appear on the face of it that it was issued in the due and lawful exercise of a power or jurisdiction conferred by law. The form of warrants to be issued by assessors to collectors was prescribed by the St. of 1785, *c.* 50, § 6. It contains no recitals. The substance of this provision has been continued in force by the Rev. Sts. *c.* 7, § 33, and the Gen. Sts. *c.* 11, § 39. In the present case, the collector adopted substantially the same form in the warrant which he issued to the sheriff and his deputies. Such a form was held to be sufficient in *Cheever* v. *Merritt*, 5 Allen, 563, provided the officer could prove the facts necessary to constitute his authority to collect the tax. This is decisive of the present case, for the only defect here alleged is in the form of the warrant. The case of *Williamstown* v. *Willis*, 15 Gray, 427, decided a different point. The action was brought by the town against the officer for not serving such a warrant. It was held that he was not liable to them; but the question of his liability to the taxpayer in case he had served the warrant did not arise.

Judgment for the defendants.

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JOHN H. RICHARDSON & another *vs.* LEVI LLOYD.

Upon the hearing of a petition for a review on the ground of the discovery of new and material evidence, consisting of a paper admitted to have been written by the respondent, as to the contents of which he had testified at the trial, when it was supposed to be lost, the judge, after admitting evidence of the petitioners as to what that testimony was, refused to hear contradictory evidence of the respondent on the same subject, and ordered a review, "being of opinion that the facts found and admitted were such as required a review, whatever the evidence offered might be." *Held*, that such refusal was a good ground of exception to the order for the review.

PETITION, filed in March 1866, for the review of a judgment, (for $1187.64 and costs, obtained by the respondent against the petitioners, in November 1865, in an action in the superior court,) on the ground of the discovery of new and material evidence.

The petition recited that the action was on three overdue and protested promissory notes, made by the petitioner Richardson, and indorsed by the other petitioner, Franklin G. Abbey, for the sums respectively of $250, $400, and $366.50, the first two dated in 1861, and the third in June 1863, but did not set forth the times when the notes fell due; that "it was specially contended, in said action, by the petitioners, that the note for $366.50 was taken by the respondent in payment of the note for $250; that said note for $250 should have been given up to the petitioners and cancelled, and that nothing was due thereon to the respondent, and evidence was introduced tending to show the said payment," but "it was testified by the respondent that the indebtedness of the petitioners to him, on or about September 26, 1863, was $1100 or thereabouts," which testimony was inconsistent with the defence against the note for $250, and "was contradicted by the petitioners, who testified that the sum was but $700 or thereabouts;" that, "since the trial of said action, the petitioners had discovered a paper," which they had supposed to be lost, "intended by the respondent as a promissory note, in the handwriting of the respondent, in these words: '$776.40. Colebrook, September 26, 1863. One day after date we severally promise to pay Levi Lloyd or bearer

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seven hundred and seventy-six dollars and forty-two cents, for value received, with interest,' which said note or paper was presented to the petitioners at or about the date thereof, with the request of the respondent to them to sign the same in payment and cancellation of all the demands which the respondent then had against them, and especially the notes in suit;" and that the petitioners had "discovered also, since said trial, that the respondent had stated to Edward Stratton, a credible witness, that the said blank note, or paper, so presented to the petitioners for their signatures, was for the full and entire amount of the indebtedness of the petitioners to him, the respondent, and was for the same amount claimed by him in the said action."

Hearing in the superior court, before *Rockwell*, J., who allowed a bill of exceptions ("if the case is a proper one to be carried to the supreme judicial court by these exceptions") in substance as follows:

"Upon the hearing, Franklin G. Abbey, one of the petitioners, was a witness. The paper of September 26, 1863, was admitted to be in the handwriting of said Lloyd. Abbey testified that Lloyd in the trial of the original action swore that the said paper, then alleged to have been lost, was written for the sum of eleven hundred and odd dollars, and for the full amount of the petitioners' indebtedness to him, and that it was not for the sum of seven hundred and odd dollars as the petitioners then claimed and testified; and Edward Stratton, on behalf of the petitioners, testified to declarations of Lloyd since the trial, substantially as alleged in the petition. And thereupon the petitioners rested.

"The said Lloyd offered evidence in contradiction of the testimony of said Abbey and Stratton, and offered to prove what his testimony was in reference to the paper dated September 26, 1863. The judge, being of the opinion that the facts proved and admitted were such as required a review, whatever the evidence offered might be, declined to hear any testimony on the part of said Lloyd, rejected the offered evidence, and ordered a writ of review." The respondent alleged exceptions.

M. Wilcox, for the respondent.

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J. Branning, for the petitioners.

WELLS, J. To entitle the petitioners to a review, it was necessary for them to establish the proposition that the newly discovered evidence was in itself new and material. As there had been testimony at the trial in regard to the paper afterwards discovered, the question could not be determined without proof of what actually occurred, in regard to it, at the trial before the jury. The court received the evidence of the petitioners upon that point; but refused to hear the testimony offered by the respondent to the same point. This was error. No fact is legally proved, in judicial proceedings, by parol evidence upon one side only, when competent and proper opposing testimony is rejected.

The determination of the facts in controversy rests conclusively with the judge who hears the case; and so also, to a degree, does the question of the propriety of granting a review. But his rulings upon the admission and rejection of testimony offered to establish or disprove the alleged facts, and upon any other question of law, or of legal right of the parties, are open to revision upon exceptions. *Davenport* v. *Holland*, 2 Cush. 1. Gen. Sts. *c.* 115, § 7. The power of the judge to determine the whole matter ultimately does not involve the right to do so arbitrarily and in disregard of the legal modes of trial of the question in issue before him. *Commonwealth* v. *Howe*, 9 Gray, 110, 113. From the exceptions it appears that the main facts, upon which the claim for a review rested, were not tried in accordance with the rules of law applicable to the trial of all questions of fact.

The testimony of Stratton presents no separate question. The admission, sworn to by him, corresponds with the testimony of Lloyd at the trial, as stated by the petitioner Abbey.

Exceptions sustained.

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JOHN H. HAMILTON *vs.* SARAH B. CONE.

Before the St. of 1844, c. 107, took effect, land paid for and occupied by a debtor, the legal title to which he had never held, but had caused to be conveyed to a third person in order to secure it from his creditors, could not be attached or taken on execution as the debtor's property. And such grantee, if he was an infant too young to participate in the fraud, may maintain a writ of entry for the land against one of such debtor's creditors who has taken it on execution.

GRAY, J. This is a writ of entry to recover one undivided fifth part of land in Stockbridge. The demandant claims title under a deed made by William Whitney to the demandant and four other children of George W. Hamilton in January 1843, when the demandant was seven months old and the oldest of the grantees was eight years of age. The tenant has the title of several creditors of George W. Hamilton, who in 1850 and 1851 commenced actions against him on debts due before January 1843, in which they specially attached this land in accordance with the provisions of the St. of 1844, c. 107, and afterwards recovered judgments upon which the whole of the land was set off on execution. The tenant offered to prove that before January 1843 George W. Hamilton held a contract from Whitney for the conveyance of the land, had built and occupied a dwelling-house thereon, had paid to Whitney the sum of twenty dollars, being the price of the land, had caused the deed thereof to be made to his infant children with the design and purpose of securing the land from attachment by his creditors, whether existing or subsequent, and thereby delaying and defrauding them, and that he was then embarrassed with debts which he had no other means of paying. The judge presiding at the trial ruled that the facts proved and offered to be proved constituted no defence, a verdict was returned for the demandant, and the tenant alleged exceptions.

The facts stated in the bill of exceptions show no title in the tenant. The conveyance in question was made in 1843. Until the St. of 1844, *c.* 107, took effect, land paid for and occupied by a debtor, the legal title to which had never been in him, but

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had been conveyed to another person in order to secure it from his creditors, could not be attached or taken on execution as his property. *Howe* v. *Bishop*, 3 Met. 26. That statute was in terms confined to future purchasers. In *Foster* v. *Durant*, 2 Gray, 538, the court did not touch this question, and had no occasion to consider it, because it was held that in that case no proceedings had been had in accordance with the statute. The Gen. Sts. *c.* 103, § 1, and *c.* 123, § 55, have no retrospective operation upon executions levied before their passage.

The only case cited for the tenant which requires special consideration is that of *Goodwin* v. *Hubbard*, 15 Mass. 210. But in that case the person to whom the conveyance was made, as well as his subsequent grantee, the demandant, participated in the fraudulent intent of the debtor who paid the purchase money; and the decision by which this court, having then no jurisdiction in equity to redress fraud, held that a grantee who participated in the fraudulent intent could not maintain a writ of entry against a creditor who had taken the land on execution against the fraudulent debtor, cannot be extended to this case, in which the demandant at the time of the conveyance to him was an infant of less than a year old and could not participate in the fraud, and there was no offer to show that the conveyance was without adequate consideration. See *Howe* v. *Bishop*, 3 Met. 30; *Clark* v. *Chamberlain*, 13 Allen, 257.

The evidence introduced and offered by the tenant therefore neither showed any legal title in himself, nor any defect in the legal title of the demandant. If the tenant has a right which can be maintained in any form against the demandant, (upon which we express no opinion,) it is in equity, and not at law.

Exceptions overruled.

I. Sumner & M. Wilcox, for the tenant.

A. J. Waterman, for the demandant.

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STOEL E. DEAN *vs.* HENRY COLT & others, executors.

A deed of warranty by which A. conveyed a mill to B. gave B. a right to take and use the water that supplied the motive power; described the original location of the canal, a hundred rods long, which conducted the water from a stream to the mill; and specified the position of a weir and waste gate in the canal, used to empty on part of A.'s adjoining land the gravel with which it occasionally became obstructed. But this location had been changed by A. so that part of the canal was on land of a railroad. After the conveyance, A., to make a head of water for another mill which he owned lower on the stream, built a dam which raised water against the bank of the canal and the weir and gate. *Held*, that, even if A. was authorized by the mill act, Gen. Sts. *c.* 149, to thus raise the water, provided that it did not injure the canal, yet, if it weakened the bank of the canal so as to make it an unsafe conductor of water and to render repairs reasonably necessary, or if it obstructed the proper use of the weir and gate, B. was not restricted to the mill act for a remedy, but the canal and weir and gate were so far a part of his mill that he might maintain an action at common law for the injury. *Held*, *also*, that if B.'s right to empty the canal upon the adjoining land was a mere easement, subject to which A. had a right to flow the land, A. was entitled to reasonable notice of B.'s intention to use the weir and gate, and to an opportunity to draw down the water so as to allow such use, before being liable to an action for obstructing it. *Held*, *also*, in such an action, that the change of the location of the canal by A. before his conveyance to B., and the subsequent purchase by A. of the land of the railroad included in the new location, were immaterial. *Held*, *further*, that B. had no right to change the position of the weir and gate so as to empty the canal upon a different part of A.'s land.

TORT for obstruction of the use of the plaintiff's waste gate and weir, and injury of the bank of his canal, by the erection, by the defendants' testator, William Pollock, of a dam across the Hoosac River, in Adams, below the plaintiff's mill. At the trial in the superior court, before *Rockwell*, J., a verdict was returned for the plaintiff; and the defendants alleged exceptions. The case is stated in the opinion.

H. L. Dawes & T. P. Pingree, for the defendants.

I. Sumner & M. Wilcox, for the plaintiff.

CHAPMAN, C. J. As the facts in this case are somewhat complicated, and do not fully appear on the face of the report, but are partly found in the documents referred to, it is necessary to recite some of them in order that the opinion of the court, in application to them, may be sufficiently understood.

The plaintiff is the owner of a factory which was formerly owned by William Pollock, the defendants' testator, and one Hathaway. On the 13th of February 1847 they conveyed it to

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one Stevens. On the 29th of September 1847 he conveyed it to the North Adams Iron Company, and on the 23d of April 1849 they conveyed it to the plaintiff. It is operated by water, taken from a branch of the Hoosac River, and carried by a canal about one hundred rods long to a small pond near the factory. A weir with a waste gate was made in the side of the canal near the factory, by means of which the water could be drawn from the canal. Pollock owned another factory on the same stream, a short distance below the plaintiff's factory; and, for the purpose of increasing the water-power at the lower factory, he has, since the sale by him and Hathaway to Stevens, erected a reservoir dam, by means of which a pond is raised, one side of which sets up against the bank of the canal, and against the waste weir and gate.

The plaintiff alleges in his writ, that, by thus raising the water, the bank of the canal is weakened, and, by raising it against the waste gate, the plaintiff has been prevented from drawing the water from his canal. He alleges further that earth has been washed out and carried away around and near his mill; but it appeared that this happened only in times of extraordinary freshets; and, under the ruling of the presiding judge, no damages were given for it, and it requires no further notice.

As to the alleged injury to the banks of the canal, the report does not state distinctly in what it was proved to consist, but in his instructions to the jury the learned judge remarked that the complaint was, that the banks of the canal were weakened. We understand this remark to refer to the evidence that had been introduced.

As to the waste gate, the evidence tended to show that a small stream, called Shore Brook, emptied into the canal near its lower end, and at times brought down gravel and earth into the canal; that the waste gate was constructed and used for the purpose of clearing out this gravel and earth, by emptying the canal through it; and that the defendants' pond, by setting up against the gate, obstructed this process of clearing out the canal, so that the plaintiff can only use it when the pond is drawn down.

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One of the grounds of the defence is, that the plaintiff cannot maintain an action at law for these injuries to his canal and gate, but that his exclusive remedy is under the act for the regulation of mills, Gen. Sts. *c.* 149. But, by the second section of this act, no dam for maintaining a water mill shall be erected to the injury of any lawfully existing mill above it or below it on the same stream. The question then arises, whether the canal and waste weir, with the gate, are not a part of the mill, within the contemplation of the statute. We are of opinion that they are. The canal furnishes the motive power as really as if it were a mere flume within the building. It is a necessary part of the artificial structure; and an injury to its banks which should permit the water to escape would injure the working power of the mill as much as an injury to the flume or gate or waterwheel. A waste weir and gate which is used for the purpose of clearing out the rubbish that has partially filled the canal and obstructed the passage of the water to the factory, is so connected with the working power of the factory as to be a part of it. The section of the act above referred to is obviously designed to protect those portions of the works from being subject to be injured by flowage upon the mere payment of damages. As to the bank, its width is not stated, nor the extent to which it is weakened; but if it is injured to such an extent as to make it an unsafe conductor of the water, and to render repairs reasonably necessary, an action at law may be maintained for such injury. If the defendants desire to keep up a pond of water against it, they should first provide for its protection against the injury. As to the waste weir and gate, it does not appear that the plaintiff has occasion to use them daily or frequently, but only occasionally, when the freshets of the brook bring gravel and earth into the canal, and disturb the flow of water to the factory. His right to empty the contents of the canal upon the defendants' adjoining land appears to be a mere easement, and the defendants have a right to use this land by flowing it in any way that shall not interfere with this easement. In this respect the case is apparently like that of *Phipps* v. *Johnson*, *ante*, 26, where the party who had a right of way

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over the land of another for the purpose of repairing his house was held to be under obligation to give the other notice that he was about to use the way, in order to entitle him to maintain an action for obstructing the way. It is not unreasonable to require the plaintiff to give such notice in order to render the defendants liable to an action for keeping up their pond of water against the plaintiff's gate; for they have apparently a right to keep the water there at all times when the plaintiff has no occasion to empty his canal. This principle should be stated to the jury in case it shall be applicable to the evidence upon a new trial.

The defendants set up two other defences. The deed of Pollock and Hathaway to Stevens describes the land on which the factory stands by metes and bounds, which do not include the land on which the canal is situated. The following clause is then added: "together with all the right and privilege conveyed to said Pollock and Hathaway by a deed from Daniel P. Lapham, (dated, &c.,) to which deed, for a more particular description, reference is had." The deed thus referred to is dated June 20, 1846. It conveys "the right and privilege to take the water from the Hoosac River, so called, raised by the dam erected by me, the said Lapham, through the bulkhead and ditch where the same now runs, to the factory of the said Pollock and Hathaway, on the land of the said Daniel P. Lapham, and to all the water in said river, raised by said dam, for the purpose of operating machinery in their said factory, if required. Also the right and privilege to go up the bank of said ditch from said factory, in a careful and prudent way and manner, with teams, to the river aforesaid, and get the sand and gravel from the bank thereof to repair said ditch and dam at all times when necessary."

Lapham at that time owned the land on which the defendants subsequently built their reservoir dam, and the land which is overflowed by their reservoir pond, together with some adjoining lands. On the same day he conveyed a part of his land to the Pittsfield and North Adams Railroad Company, "reserving to Pollock and Hathaway all the rights of conducting water by a

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ditch across the above described premises." And he also conveyed the land now covered by the defendants' reservoir dam and pond to Pollock and Hathaway. In the fall of the same year, Pollock and Hathaway, by the permission of the railroad company, changed the direction of the canal, and located a part of it, including the waste weir and gate, on the land of the railroad company. This part of the canal was thus situated on the land of the railroad company on the 13th of February 1847, when the deed above mentioned was made by Pollock and Hathaway to Stevens. Of course the deed to Stevens could give him no right to maintain the canal on the land of the company, except such as resulted from the parol assent given by the company to the change of location, which would be a mere license.

The defendants contend that this license was revocable, and has been revoked by the railroad company. The alleged act of revocation consists in the execution of a deed of quitclaim, given by them November 1, 1847, to Pollock and William C. Plunkett, bounding on the west bank of the canal, and including the land covered by the defendants' dam and pond. The report leaves it in doubt whether this tract covers any part of the canal. If it does not, and the canal is on the land which still belongs to the railroad company, the defendants have no right to question the plaintiff's title to maintain his canal upon it. That right belongs to the company, and the title is good as to the defendants. If that tract does include the canal, still it is not necessary to determine whether the deed would authorize Pollock and Plunkett to change the canal and restore it to its former place. The deed of Pollock and Hathaway to Stevens expressly conveys the right to take the water of the river to the factory from the dam, through the bulkhead and ditch then existing. The fact that the grantors had, under a parol license, altered a part of the ditch or canal, by placing it on the lands of the railroad company, would not justify the defendants in obstructing the flow of water from the river to the mill in some way, and through some channel; for the deed of Pollock and Hathaway grants a right to the use of the water in addition to the grant of the

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rights derived from Lapham's deed, and to obstruct this use would be a violation of the right thus granted. The defendants contend that the subsequent grant of the railroad company to Pollock and Plunkett did not inure to the benefit of Stevens and his grantees by way of estoppel. We need not decide this point. Nor is it necessary to apply to the case the doctrine stated in *Larned* v. *Larned*, 11 Met. 421, and *Pope* v. *Devereux*, 5 Gray, 409, that the substitution, by parol agreement, of a new way for an old one which is abandoned, is a dedication of the new way, and is irrevocable. Nor is it necessary to deny the doctrine stated in *Morse* v. *Copeland*, 2 Gray, 302, that a parol license to create an easement on the land of the licensor is revocable; or to discuss the questions, relative to the character of such licenses, which are suggested in Washburn on Easements, 200, 201; for the right of the plaintiff to take and use the water is granted to him with warranty by Pollock, and is not dependent upon the precise locality of the canal. If Pollock afterwards disturbed the flow of the water by weakening the banks of the canal, without providing some other channel, he committed a tort; and the same is true if he obstructed the emptying of the canal through the waste gate. It is no excuse for him to say that when he made the deed to Stevens his only title to maintain the canal where it then was consisted of a mere parol license from the railroad company. If it be admitted that the company had a right to revoke that license, and that he afterwards purchased their right to revoke it, still he had no right to do any act in violation of his grant of the water, which was with warranty of the right to use it. This ground of defence cannot therefore prevail.

But the defendants further offered to prove that the plaintiff had moved a part of the canal and waste weir, after the conveyance to him. The statement of this part of the case in the report is not very clear. But it appears that the court ruled that such evidence was immaterial. This ruling involves the idea that the plaintiff might legally close his existing waste gate, and construct a new one in a different place, and thereby empty the contents of the canal on another portion of the defendants' land.

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But no such right was granted in the deed under which he claims, and he has no easement of this character except what is there granted. Such evidence was therefore material, and should have been admitted. If the defendants' pond merely obstructs the passage of the water and gravel through a new gateway, which was made subsequently to the conveyance to Stevens, they have not thereby violated any right of the plaintiff. The ruling on this point was therefore erroneous.

Exceptions sustained.

STOEL E. DEAN *vs.* HENRY COLT & others, executors.

Under the mill act, Gen. Sts. c. 149, the proprietor of a mill on a stream may raise his dam so as to use all the unappropriated water power, even if he thereby causes water of his pond to flow into the raceway of a mill higher on the stream.

If the proprietor of a mill on a stream, who has lowered his wheel-pit so that by lowering the wheel he might use unappropriated water power, continues to use his wheel as before, and shows no intention to lower it, the proprietor of a mill lower on the stream may appropriate such power, provided that he does not injure the upper mill as it exists; and is not estopped by the fact that the proprietor of the upper mill holds under him by deed of warranty.

TORT for the obstruction of the machinery of the plaintiff's mill on the Hoosac River, in Adams, by water raised by a dam built by the defendants' testator, William Pollock, lower on the stream. At the trial in the superior court, before *Rockwell*, J., the jury returned a verdict for the plaintiff, and assessed damages in the sum of $4350; and the defendants alleged exceptions. The case is stated in the opinion.

H. L. Dawes & T. P. Pingree, for the defendants.

I. Sumner & M. Wilcox, for the plaintiff.

CHAPMAN, C. J. This action was originally brought against William Pollock, the defendants' testator. The plaintiff alleges that he is the owner of a manufacturing establishment situated on a branch of the Hoosac River, and that the defendant has erected a dam across the stream a short distance below, whereby he has caused the water to flow back and obstruct the plaintiff's

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wheels and machinery, from August 31, 1863, to March 30, 1865. It appeared that the plaintiff's establishment was formerly owned by Pollock, the testator, and one Hathaway; that they conveyed it to one Stevens February 13, 1847; and that through a mesne conveyance the property came to the plaintiff April 23, 1849. Pollock owned a factory on the stream below the plaintiff's factory and dam at the time of the conveyance to Stevens, and the evidence tended to show that his dam was not high enough to use all the power that existed in the stream below the plaintiff's wheel, and that he afterwards raised his dam for the purpose of using this power. In 1853 the plaintiff put in a new wheel of larger dimensions than his old one, and constructed a deeper wheel-pit than the old one, but did not lower the bottom of his wheel. In this condition of things the water set back by Pollock's dam did not obstruct his wheel. In 1858 he lowered his new wheel several inches nearer to the bottom of his wheel-pit; and since that time the back water has obstructed it.

The defendants contend that Pollock had a right to raise his dam so high that he could use all the unappropriated power of the stream, even to the extent of setting back the water into the plaintiff's raceway, provided it did not obstruct the plaintiff's wheel or otherwise injure his mill; and that, if the plaintiff is otherwise injured by the flowing, his only remedy is under the statute for the support and regulation of mills, Gen. Sts. *c.* 149; and this position is too well established to admit a doubt. *Knapp* v. *Douglas Axe Co.* 13 Allen, 1.

The time when Pollock raised his dam is not material, provided it was done before the plaintiff appropriated the power to his own use. Such an appropriation would not be made by merely lowering his wheel-pit, unless he did it as the commencement of an occupation of the power. The way in which he fixed his new wheel and kept it till 1858 negatives any present intent to occupy the power. Thus he left it to be taken and used by the proprietor below him. Nor is the fact material that the plaintiff holds his mill under a conveyance from Pollock. A deed of land through which a stream runs, though it contain

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the usual covenants of warranty, does not estop the grantor from subsequently erecting a dam below the land and thereby flowing it under the protection of the mill act, in the same manner as if the proprietor had derived his title from some other source.

Exceptions sustained.

Marshall Brace *vs.* Allen S. Yale.
Allen S. Yale *vs.* Marshall Brace

The owner of a mill on a stream who has a right to draw down from his reservoir more or less than the natural flow of the stream, at his pleasure, to work his mill, is entitled to relief in equity against the owner of an intermediate dam which delays the passage of the water by the time necessary to fill the defendant's pond, and by its leaky condition allows the water to run so to waste, when the plaintiff's mill is not at work, as to make it necessary to fill the pond from day to day.

If the use of the water of a stream in its natural flow would be of no value to the owner of a mill situated between the reservoir and the mill of another who has a prescriptive right to draw from the reservoir, for the purpose of working his mill, more or less than such natural flow at his pleasure, the former is not entitled to relief in equity against the latter for making a different use of the water, by raising and tightening his dam and by different machinery at his mill, from that which he made while gaining his prescriptive right.

Two bills in equity between the parties to the actions at law reported 4 Allen, 396, 10 Allen, 441, and 97 Mass. 18. Issue was joined, in each, on the answer; they were referred to a master to take and report the evidence; and were heard together, on the pleadings and master's report, by *Colt*, J., and by him submitted, as follows, to the determination of the full court.

"Brace, in his bill, in substance complains that Yale has erected obstructions between the plaintiff's ancient mill on Marsh Brook and the plaintiff's reservoir dam at the head of said brook, by which the flow of the water is at times obstructed and retarded, and at other times the water is suffered to flow in quantities so increased as to run to waste at the plaintiff's mill, in violation of his prescriptive rights as ascertained and established by a judgment in his favor in this county in 1866, in a suit between these parties.

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"In the other suit Yale's bill charges, in substance, that Brace in 1863 increased the machinery at his mill, raised the dam, put in additional wheels requiring more water, and so uses his mill, and the reservoir in connection with it, as to deprive Yale of the reasonable use of the stream consistently with the rights of Brace so acquired by prescription; and particularly, that Brace is in the practice of opening the reservoir gates and letting off large quantities of water which flow by without benefit to Yale's mills situated between Brace's dam and the reservoir, and that at other times Brace permits a stream of water to flow from the reservoir so small in quantity as to be useless in driving Yale's said mills.

"The writs and all the papers in the two cases of *Brace* v. *Yale*, reported 4 Allen, 396, and 10 Allen, 441, with the judgments, were put into the case; and may be referred to, if necessary. It was denied that the statement of facts agreed upon by the parties in the last named case was conclusive upon them now; but, whether so or not, I do not find upon all the evidence anything to vary the facts as then agreed.

"All the evidence satisfies me that the prescriptive rights which Brace has acquired were so acquired when his privilege, and the reservoir in connection with it, was used for the purpose of running a common wood saw-mill where his present mill is situated. During the period of such acquisition the water of the brook, as it flowed from the reservoir down to Brace's mill, was used to a considerable extent by intermediate riparian proprietors for a period of more than twenty years for the purpose of propelling their mills situate where Yale's mills now are. The owners of the Brace privilege exercised entire and exclusive control over the flow of the water, which was regulated (except in times of high water, when the reservoir was full and overflowing,) by the gates at the reservoir dam; and the owners of the Brace privilege used the water at such times and in such quantities as it was required to drive the saw-mill, the requirements of the mill being the measure of their use when there was a supply to be had, but not interfering with the gates of the reservoir dam when the natural overflow of the dam from high water was sufficient for the wants of their mill.

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"Brace became purchaser of his mill and privilege in 1860, and in 1863 made improvements in his dam, stopping its leaks and materially increasing its capacity and height. He also added other machinery, put in an additional water wheel, and now uses the mill with an upright saw and circular saw for sawing logs, and small circular saw for sawing wood and lath, and for a grist and cider mill. I was satisfied that, after Brace's improvements and before the time of the filing of Yale's bill, Brace, when driving only a portion of his machinery, required less water than was used to drive the old saw-mill during the time when his prescriptive rights were gained; and accordingly, in times when there was no overflow in the reservoir, he was in the habit of drawing the water, after the ponds were filled in the morning, in a smaller volume from the reservoir than was formerly required to run the old saw-mill. This was partly because less power was required to propel only a portion of his works, and partly because by the repairs on his dam much water that before wasted by leakage was saved. The water, when used in this diminished quantity by Brace, was insufficient, as it flowed past the mills of Yale, to be of any use in driving them; and the water, when so used, was valueless to Yale.

"I find that Marsh Brook, in its natural and ordinary flow, when not supplied by heavy rains or melting snow, and with no reservoir to collect the water, is a small and insignificant stream, and of little or no use for mill purposes; and I find from the evidence, that the stream (except in times of high water) without the reservoir of Brace and in its natural flow would be no more useful to the mills of Yale than it is under the use made of it by Brace above stated, and that, if the reservoir were now removed, there would be the same or a greater insufficiency of supply for Yale's mills.

"I find that during the period in which Brace's prescriptive rights were acquired, whenever water was drawn from the reservoir for the use of the saw-mill it was drawn in such quantities as to be available for driving the mills now owned by Yale; and that, as Yale's mills and dams were then constructed and arranged, such use could profitably be made of the water, with-

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out materially interfering with or impeding the flow of the water to Brace's mill. But I find that in 1831 Yale became the owner of his lower or oil mill property; that in 1854 he materially enlarged his dam for that mill, building it of stone and increasing its height; and that in its present leaky condition it would now constitute a material impediment to the uniform and rapid flow of water from the reservoir to Brace's mill, even if Brace in his use of the water is to be governed in respect to volume and quantity by the use made of it by the old saw-mill for the above stated period of prescription. The oil mill dam in its present condition requires to be wholly or in part filled each morning to supply the leakage; and, unless wholly removed, or so repaired as to hold water, it must continue to constitute the impediment and obstruction described. The mill connected with this oil mill dam has not been used, or at least for only a part of one day, since the decision in the last case of *Brace* v. *Yale*, but the disuse of the dam does not obviate the difficulty. It was proved that this obstruction delayed the flow of the water, from the necessity of filling it up, from one to two hours, according to the quantity drawn from the reservoir, and that the quantity of water which the dam contained leaked away in the night time, after Brace's mills were stopped and the reservoir gates were closed, and was so lost and wasted to Brace.

"If, upon the whole case and the facts thus found by me, the court should be of opinion that in *Brace* v. *Yale* Brace is entitled to relief, then the court may decree that the obstruction caused by the oil mill or lower dam of Yale shall be removed by removing the dam, or otherwise obviated by so repairing said dam, with its flumes and waste ways, that it shall remain continually full, requiring no delay to fill it when the gates of the reservoir are open. And if, under the facts found by me, in *Yale* v. *Brace* the court are of opinion that the defendant is confined to use the water in volume and quantity as it was used by the old saw-mill during the period of prescription, then I am of opinion that a decree should be entered restraining Brace to such use. I report the case to the full court, however, for such final or further action as to the court may seem proper."

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I. Sumner & H. J. Dunham, (*J. Dewey, Jr.*, with them,) for Brace.

H. W. Bishop, (*M. Wilcox* with him,) for Yale.

HOAR, J. There is nothing in the facts found and reported in the first suit, which, in the opinion of the court, can change the rule governing the rights of the parties, which was applied in *Brace* v. *Yale*, 10 Allen, 441, and *Same* v. *Same*, 97 Mass. 18.

The right of the plaintiff, acquired by prescription, as founded upon the facts agreed in *Brace* v. *Yale*, 10 Allen, 441, was a right to retain the water in the reservoir, and let it down in such quantities and at such times as he chose, for the purpose of working his mill. Although the defendant might derive some advantage from it as it passed his mill, he had no right to interfere with the time or manner of letting it down. He had no property or right in the reservoir, and could not lawfully obstruct or delay the passage of the water which came from it. But it was found in the action at law, and is again found, that the defendant's dam in its present condition constitutes such an unlawful obstruction. It delays the passage of the water by the time which is required to fill the defendant's pond; and by its leaky condition it allows the water to run to waste when the plaintiff's mill is not in operation, so as to necessitate a repeated filling from day to day. This invasion of the plaintiff's right is found to exist to the prejudice of the plaintiff's unquestioned use of his mill, and without reference to the alterations and improvements which he has made.

In *Brace* v. *Yale*, 97 Mass. 18, it was decided that the rights which the plaintiff had before the alterations in his dam are not affected by them; and that the defendant was answerable in an action at law for holding back or letting down water contrary to the rights established by prescription. The remedy in equity must depend upon the same principles. The plaintiff is therefore entitled to the relief which he seeks.

Decree for the plaintiff accordingly, with costs.

In the other suit the question is raised whether the fact that the defendant, by raising and tightening his dam, and putting

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different machinery into his mill, makes a different use of the water from that which he made while he was gaining his prescriptive right, gives the plaintiff any right to have the flow of the water from the reservoir regulated for his benefit. And we cannot perceive that it does. The acquisition of the prescriptive right to use the reservoir by the defendant certainly gave the plaintiff no right in it. The plaintiff might use it or not at his pleasure. If there were no prescriptive right to use the water in the way it is now used, still the only right of the plaintiff would be to the use of the water in its natural flow, and this the report finds is of no value to him. He is not injured by being deprived of it, and is not therefore entitled to any equitable relief. His real ground of complaint is, that the defendant does not use the prescriptive right to his advantage, which he is not bound to do. He may omit to exercise it entirely.

Bill dismissed, with costs.

Helen W. Lea *vs.* John Lea.

A party to a marriage by whose extreme cruelty the desertion of the other party has been caused, or a husband whose gross or wanton and cruel neglect to provide suitable maintenance for his wife, he being of sufficient ability so to do, has caused her desertion of him, cannot maintain a libel on the Gen. Sts. c. 107, § 7, for a divorce on the ground of such desertion.

The voluntary character of the withdrawal of a wife from cohabitation with her husband, caused by his extreme cruelty or his gross or wanton and cruel neglect to provide suitable maintenance for her, he being of sufficient ability so to do, does not deprive her of her right to a divorce on the ground of desertion, although he accompanies his acts of cruelty or neglect with permission for her to leave him.

A verdict and judgment are conclusive by way of estoppel only as to facts without the existence and proof or admission of which they could not have been rendered.

A decree dismissing a libel for a divorce, which may have been entered upon the ground of either one of three sufficient defences relied on by the libellee, is conclusive between the parties as to neither of them.

A decree dismissing, after a hearing on the merits, the libel of a husband, on the Gen. Sts. c. 107, § 7, for a divorce from his wife on the ground of her desertion continued for five years consecutively without his consent, in defence against which she denied that she was guilty in manner and form as alleged, and specified that her withdrawal from him was caused by his extreme cruelty, or his wanton and cruel neglect to provide suitable maintenance for her, he being of sufficient ability so to do, is no bar to a libel by her against him, on the same statute, for a divorce for the same desertion.

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Libel filed January 16, 1867, for a divorce from the bond of matrimony for the cause of the libellant's desertion of the libellee "for a period of five years consecutively, to wit, from March 31, 1858, to the day of the filing of this libel," which desertion was alleged to have been caused by extreme cruelty of the libellee, and by his wanton and cruel neglect to provide suitable maintenance for the libellant, he being of sufficient ability so to do; also for the cause of the adultery of the libellee.

At the hearing it was admitted that the desertion relied on began at and continued during the same time as the desertion alleged and relied on in a libel filed by this libellee against this libellant at May term 1863 for Berkshire. The record of that suit was introduced in evidence, by which it appeared that the libel then by the husband alleged that the wife had deserted him for five years consecutively without his consent; and that in defence against the same she denied that she was guilty in manner and form as alleged, and specified that she had been compelled to withdraw from cohabitation with him by his extreme cruelty and by his wanton and cruel neglect to provide suitable maintenance for her, he being of sufficient ability so to do; that on trial by jury a verdict was returned that the wife was not guilty; and that the case was thereafter continued, on a report of the presiding justice to the full court, until September term 1864, when a decree was entered dismissing the libel, after the decision reported 8 Allen, 418, which decision it was agreed might be referred to in this suit.

The question, whether that decree was conclusive evidence in this suit that there had not been such desertion as was necessary to sustain this libel, was reserved by *Gray*, J., for the determination of the full court; the case to stand for trial on all the allegations, if in their opinion the decree was not so conclusive; otherwise, to stand for trial only on the allegation of adultery.

J. Dewey, Jr., for the libellant.

T. P. Pingree & J. M. Barker, for the libellee.

Wells, J. The wife alleges that she deserted her husband, and that the desertion was caused by his extreme cruelty and by his gross, wanton and cruel neglect to provide suitable mainte-

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nance for her. In the former case of *Lea* v. *Lea*, 8 Allen, 418, the husband sought a divorce on the ground of the same act of desertion by the wife which she relies on in this case. She then denied that it was legally such a desertion as entitled him to a divorce, setting up his wrongful acts in justification. The court instructed the jury that, if they should find that the respondent left her husband with his approbation, wishes or consent, it did not constitute a desertion in law. It does not appear whether the verdict for the respondent in that case was rendered upon the ground that the desertion was caused by cruelty, &c., or that it was by consent. Either would have been a sufficient defence, because this court then decided that under the St. of 1857, *c.* 228, § 2, (Gen. Sts. *c.* 107, § 7,) as well as under the St. of 1838, *c.* 126, a divorce for desertion can be granted only when the separation has been caused by the wrongful conduct of the party against whom the divorce is sought. A party, therefore, who has caused the separation by his cruelty, neglect, or consent thereto, cannot charge it upon the other as a desertion which entitles him to a release from his obligations. But the statute expressly authorizes the party withdrawing from the marriage relation, on account of cruelty or neglect, to obtain a divorce after five years. The application of the term "desertion" to such a withdrawal must be understood with reference to the subject matter of the provision, and the term, in that connection, interpreted accordingly. Desertion, in the sense of separation, is the condition of a divorce in either case. It is granted against the party whose wrongful conduct caused the separation; and refused to such party, when applying for it, although the other party has withdrawn from his society, and, in that sense, deserted him.

Some ambiguity arises from the language of the first clause of the section, which seems to authorize a divorce "in favor of either party." But the effect of this language is controlled by the terms of the proviso; and, as already seen, the interpretation derived from the whole of the section, aided by reference to the preceding legislation upon the subject, is, that the divorce is granted against but not in favor of the party by whose wrongful conduct the separation was caused.

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When the separation is by mutual consent, neither party can obtain a divorce. But the voluntary withdrawal of the wife, induced by cruelty or neglect of the husband, is not such consent as would deprive her of the right to a divorce, even if the husband should accompany his cruelty or neglect with permission for her to depart from his house and society.

The question then recurs as to the effect of the verdict and judgment in the former case. The present respondent contends that the result of the first suit was to disprove the fact of desertion by the wife; and that such finding is conclusive upon her in this proceeding; that the desertion by her, required for the purposes of this suit, must be of the same character as would be required to be shown as ground of a divorce in favor of the other party. But such a construction would render the provision for a divorce, in favor of the party deserting, entirely nugatory. The construction already indicated, that in all cases of separation a divorce may be granted against the party in fault in favor of a party who is not chargeable with fault therein, gives to the whole section consistent operation and effect.

The issue tried in the former suit was not merely upon the bare fact alleged, of desertion for five years by the wife, but upon that question modified by her grounds of justification; namely, cruelty, neglect to provide, and consent. It does not follow, because the only question brought up by the exceptions in that case related to the ground of consent, that the judgment or the verdict of the jury was rendered upon that ground. It might equally have been upon the ground either of cruelty or neglect, and in that case would be entirely consistent with the position of the libellant in this case. Indeed, if it could be made to appear to have been rendered upon either of the latter grounds, it would seem to be conclusive in her favor upon that part of her case. But there are no means of determining upon which of the three consistent grounds of defence the verdict was rendered; and therefore it cannot be conclusive upon either.

Case to stand for trial upon all the allegations of the libel.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF HAMPSHIRE AND FRANKLIN, AT NORTHAMPTON, SEPTEMBER TERM 1868.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. EBENEZER R. HOAR,
HON. HORACE GRAY, JR.,
HON. DWIGHT FOSTER,
HON. JOHN WELLS,
} JUSTICES.

HAMPSHIRE COUNTY.

COMMONWEALTH *vs.* TIMOTHY FOLEY.

On the trial of an indictment for being a common railer and brawler, loud and violent language used by the defendant in the heat of sudden altercations may be given in evidence, although used only in his own dwelling-house and addressed only to the persons with whom the altercations occurred; and will sustain the charge, if, with other evidence, it shows that he was accustomed to use immoderate and vituperative language so publicly and frequently as to be a common disturber of the public peace.

COMPLAINT for being a common railer and brawler and disturber of the peace. At the trial in the superior court, before *Vose*, J., on appeal from a trial justice the jury returned a verdict of guilty, and the defendant alleged exceptions as follows:

"The evidence on the part of the Commonwealth tended to show that the defendant, on many occasions, several times each

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week, within the time mentioned in the complaint, used loud and violent language, generally to some person or persons in or near his dwelling-house, and frequently to his wife when in the house; that the language consisted of opprobrious epithets and exclamations; that on several of these occasions, sometimes on Sunday, in the afternoon, and at other times in the night time of other days of the week, people passing and living in the neighborhood of the defendant's house (from twenty-five to fifty persons, and once as many as a hundred and fifty) gathered near it, having been attracted thither by his said loud and violent language; and that, after they were thus assembled, he continued the same, addressed sometimes to the crowd, as well as to another person or other persons in or near the house, and at other times apparently not addressed to any particular person or persons or to the people assembled.

"The defendant testified that on all the occasions complained of he used the language and exclamations, imputed to him, with persons who came to his house to visit his wife against his will, or to persons who occupied another house of the defendant's, a few feet distant from the former one, whom the defendant was endeavoring to oust from the premises by legal process, and by whom he was insulted and provoked to use the utterances in question; and asked the court to rule that, if any of the occasions relied on by the Commonwealth were occasions when the defendant was betrayed into violent expressions in the heat of an altercation suddenly arising with some person or persons with whom he came in contact, and these expressions were aimed at the party with whom he was in altercation, such occasions could not be treated by the jury as evidence of the common railing and brawling charged in the complaint. The judge declined so to rule; and ruled that the language and epithets used on such occasions might be considered with all the other evidence introduced by the Commonwealth."

C. Delano, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

Hoar, J. The defendant suggests that this case presents a fit occasion to define with precision the statute offence of being

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a common railer and brawler. But this hardly seems to be necessary; as under the most limited definition we can have no doubt that the evidence to which objection was made at the trial was competent in support of the charge in the complaint.

If the defendant, in his own dwelling-house, was in the habit of using loud and violent language, consisting of opprobrious epithets and exclamations, in such a manner as to attract crowds of persons passing and living in the neighborhood, on Sundays as well as other days, and in the night as well as in the day-time, he was a disturber of the public peace by railing and brawling. And "occasions when he was betrayed into violent expressions in the heat of an altercation suddenly arising with persons with whom he came in contact, and these expressions, aimed at the party with whom he was in altercation," were properly regarded as furnishing evidence against him, if they were frequent and habitual, and the language so immoderate and vituperative, and uttered so freely, publicly and continuously, as to disturb the peace of the neighborhood. The evidence tended to show that he had no control over his temper or his tongue, and thereby made himself a nuisance. The merits of his quarrels had little to do with the question before the jury, which chiefly concerned his manner of conducting them.

Exceptions overruled.

COMMONWEALTH *vs.* TIMOTHY FOLEY.

On the trial of a complaint which alleges that on a day specified the defendant "was and is a common drunkard, having been at divers days and times since said day drunk and intoxicated by the voluntary and excessive use of intoxicating liquors," the evidence in support of the charge must be confined to acts of the defendant done on a single day.

COMPLAINT, dated May 25, 1868, that the defendant "on the first day of January in the year of our Lord eighteen hundred and sixty-eight" "was and is a common drunkard, having been at divers days and times since said first day of January in the year one thousand eight hundred and sixty-eight drunk and

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intoxicated by the voluntary and excessive use of intoxicating liquors."

At the trial in the superior court, before *Vose*, J., on appeal from a trial justice, the judge ruled that evidence was competent in behalf of the Commonwealth of any and all instances of drunkenness of the defendant between said first day of January and the date of the complaint; and admitted such evidence against the objection of the defendant, who contended that the attorney for the Commonwealth should elect some one day to which to apply his evidence under the complaint in that form.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. Delano, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

Chapman, C. J. The complaint alleges in proper form that the defendant was a common drunkard on the 1st of January 1868. *Commonwealth* v. *Boon*, 2 Gray, 74. But it does not allege in proper form that he was a common drunkard at any other time; the words "having been at divers days and times since said first day of January in the year one thousand eight hundred and sixty-eight drunk and intoxicated by the voluntary and excessive use of intoxicating liquors," not being sufficient. *Commonwealth* v. *Gardner*, 7 Gray, 494. The evidence should therefore have been confined to acts done on a single day. *Commonwealth* v. *Elwell*, 1 Gray, 463. *Exceptions sustained.*

Hieronymus H. Hamlin *vs.* Gilbert V. Jacobs.

No appeal lies to this court from a decision of the superior court upon an answer in abatement.

Gray, J. This is an action of contract upon an account annexed. The defendant pleaded in abatement that when the writ was sued out the plaintiff had a previous action pending against him for the same cause; and the parties submitted the

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validity of the answer in abatement upon an agreed statement of facts to the superior court, which gave judgment thereon for the defendant, and the plaintiff appealed to this court. We have not considered whether the judgment below was right, because we have no jurisdiction to entertain the question. By the statutes of this Commonwealth, from the time when the jurisdiction of this court in civil actions was limited by the act of 1840, a decision in the court of common pleas or superior court of any question arising on a plea or answer in abatement, either upon the face of the record, by demurrer or otherwise, or upon the admission of evidence or instructions to the jury, is final, and cannot be brought before this court by appeal, exceptions, report of the presiding judge, or writ of error. Sts. 1840, *c.* 87, §§ 4, 5; 1855, *c.* 449, §§ 5, 6; 1859, *c.* 196, §§ 26, 27. Gen. Sts. *c.* 114, § 10; *c.* 115, § 7. *Browning* v. *Bancroft*, 5 Met. 88. *Sawyer* v. *Pratt*, 9 Met. 170. *Bartol* v. *Stanwood*, 7 Cush. 115. *Blackmer* v. *Davis*, 16 Gray, 120. *Richmond* v. *Whittlesey*, 2 Allen, 230. *Stackpole* v. *Hunt*, 9 Allen, 539.

Appeal dismissed.

J. H. Blair, for the plaintiff.

S. T. Spaulding, for the defendant.

JOSEPH M. KELLOGG *vs.* HELEN WAITE & trustee.

On an appeal improperly taken by the defendant from a judgment of the superior court charging a trustee in foreign attachment, the trustee is not entitled to costs.

APPEAL from the taxation of costs in a trustee process brought originally before a trial justice, by whom judgment was ordered for the discharge of the trustee on his answer; from which the plaintiff appealed to the superior court, where judgment was ordered charging the trustee; from which the defendant appealed to this court, where the latter judgment was affirmed, as reported 12 Allen, 529. In taxing the costs of the trustee, the clerk of the superior court disallowed all items claimed by him as accru-

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ing after the latter appeal; the superior court affirmed the disallowance; and the trustee appealed to this court.

S. T. Spaulding, for the plaintiff.

C. Delano, for the trustee.

Foster, J. By the provisions of the Gen. Sts. *c.* 142, §§ 60–74, a trustee is entitled to costs of travel and term fees at every term until he is charged or discharged. Where a claimant to the fund in the hands of the alleged trustee intervenes, there can be no determination as to the liability of the trustee until such claim has been finally disposed of. *Croxford* v. *Massachusetts Cotton Mills*, 15 Gray, 72. *Morrison* v. *McDermott*, 6 Allen, 122. Where the question of the trustee's liability is made the subject of an appeal, this rule continues applicable until the appeal is determined. *Holbrook* v. *Waters*, 19 Pick. 356. An exception obtains, where a trustee, having been charged in one court, appeals to another, and is there also charged. In such a case he is not allowed costs after the date of the judgment from which he has appealed. *Ball* v. *Gilbert*, 12 Met. 405. Also, where an issue of fact is tried between the plaintiff and alleged trustee, costs may be awarded to either party in the discretion of the court. § 60. The defendant in a trustee process has no legal interest in the question whether the trustee shall be charged or discharged. It does not bind him in any subsequent suit as an adjudication either of the fact or the amount of the indebtedness of the trustee to him. Nor is the pendency of the trustee process any defence to a suit by the defendant therein against the trustee. *Winthrop* v. *Carlton*, 8 Mass. 456.

As soon as a trustee is discharged, he may have execution for his costs. As soon as he is charged, his further attendance upon court is unnecessary, and he is entitled to no subsequent costs. The statute does not expressly provide for what length of time he may receive travel and term fees; but the limit fixed by the court is, until a judgment charging or discharging him. It is true that the case may subsequently proceed between plaintiff and defendant, and until it terminates the trustee who is charged cannot know whether he is to have execution against the plaintiff or to retain the amount of costs out of the funds in his

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hands. He may also need to take notice if the trustee process ends in a judgment in the defendant's favor; as in that event his liability as a debtor to pay his debt is no longer suspended. But practically further attendance upon court for these purposes is not sufficiently necessary to make it right, in the absence of an express statute, to give costs after the trustee has been charged.

These rules have long been settled by usage, and the taxation of costs appealed from is in conformity with them.

In the present case, the plaintiff appealed from the judgment of the magistrate discharging the trustee. This carried the whole case into the superior court, left the question of the trustee's liability undetermined, and made it his duty to attend in the superior court until he was there charged. From the judgment of the superior court charging the trustee, the defendant appealed. This he had no right to do. The proceeding was wholly irregular, and if the attention of the court had been drawn to the fact that the defendant claimed the appeal, it would have been dismissed. But no such point was suggested; and the papers furnished to the court did not show by whom the appeal was taken. We think the trustee ought not to recover costs of this improvident proceeding. He had no occasion to follow the case into this court. The judgment of the superior court charging him was not vacated by the irregular appeal; and remained a sufficient protection to him, if he were called upon to pay the money in his hands on an execution against the defendant. If the trustee followed the case into this court in order to reverse the judgment by which he was charged, then he is entitled to no further costs, as he did not succeed in this attempt. *Ball* v. *Gilbert*, 12 Met. 405.

Taxation of costs affirmed.

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ANNA GOETZ *vs.* GEORGE VOELINGER.

The statute of limitations, Gen. Sts. *c.* 156, §§ 1, 6, is not a bar to an action brought in this Commonwealth by a foreigner within six years after coming for the first time to the United States, for breach of a promise of marriage made to her twenty years previously in her native country.

CONTRACT for breach of a promise of marriage. The case was submitted for the determination of the court on the following facts agreed; an assessor to be appointed to assess damages if the plaintiff could recover, otherwise judgment to be entered for the defendant.

"The plaintiff and defendant are both Germans; and in Germany about twenty years ago they mutually agreed to marry each other; and they had several bastard children there. Sixteen years ago, the defendant came to this country, and has ever since lived in Hatfield, in this Commonwealth; and fifteen years ago, in Hatfield, he married a woman with whom he has ever since lived as his wife. Some time after the defendant came to this country, he sent for one of said bastard children, and has since supported the same. It was the expectation of the parties, and their purpose, to perform the marriage contract, up to the time of the departure of the defendant from Germany. Two or three years after the marriage of the defendant the plaintiff knew and heard of it. Up to that time she expected to marry the defendant. She continued to live in Germany until some two years ago, when she came to this country."

C. Delano, for the plaintiff, cited *Hall* v. *Little*, 14 Mass. 203; *Bulger* v. *Roche*, 11 Pick. 36; *Von Hemert* v. *Porter*, 11 Met. 210.

No counsel appeared for the defendant.

CHAPMAN, C. J. It is admitted that the plaintiff is a foreigner, and never came to this country till about two years ago. The action therefore is not barred by our statute of limitations, Gen. Sts. *c.* 156, §§ 1, 6. See cases cited by the plaintiff's counsel.

Judgment for the plaintiff; and assessor to be appointed according to agreement of the parties.

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Daniel W. Bond *vs.* Mount Hope Iron Company.

A. owned twenty shares in the stock of a corporation, the certificate of which stood in his name, and fifty shares, the certificate of which stood in the individual name of B., the president of the corporation, as collateral security for A.'s promissory note; both certificates expressed to be transferable by A. and B. respectively, "on producing this certificate," and to be subject to a by-law which prescribed conditions precedent to any sale of the stock. After complying with the by-law, A. sold the seventy shares to C., to whom he gave an assignment of the twenty shares on the back of the certificate thereof, and a separate assignment of the fifty shares subject to B.'s claim. C. paid A.'s note to B.'s clerk, who receipted in B.'s name for the payment on the back of the certificate of fifty shares, and gave it up, with A.'s note, to C., all in the presence and with the knowledge of the treasurer of the corporation, of whom C., having both certificates and assignments with him, asked a transfer of the seventy shares and the issue of new certificates thereof in C.'s name. This the treasurer refused, on the sole ground that A. had not complied with the by-law; but afterwards took from C. copies of the two assignments, and promised to send him new certificates at the end of a week. Not having then received them, B. wrote to the treasurer, again demanding a transfer and new certificates; and, receiving no reply, sued the corporation for conversion of the shares, waiving all his own claim or right therein and offering to transfer the same to the corporation. *Held*, that C. might maintain the action; that it was immaterial that B. was sick at the time of C.'s demands and until after the bringing of the action, and so could not sign any transfer or certificates; and that it was also immaterial that C. did not leave the old certificates with the treasurer, if copies of the assignments were all that the treasurer required of him.

Tort, with a count in contract, for the conversion of seventy shares in the capital stock of the defendant corporation.

At the trial in the superior court, before *Vose*, J., there was evidence tending to show that George W. Bond, a brother of the plaintiff, owned the seventy shares, in two lots, one of twenty shares, (for which he held the certificate in his own name,) the other of fifty shares, which he had pledged to Albert Field to secure the payment of a note for upwards of $6000, (the certificate of which stood in the name of Field, who was the president of the corporation, as collateral security, and was so expressed on its face); that the plaintiff bought all these shares from George W. Bond, who indorsed upon the back of the certificate of the twenty shares a formal assignment of all his right, title and interest therein to the plaintiff, and executed a separate assignment to the plaintiff of all his right, title and interest in the fifty shares, describing them by their numbers, setting forth

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fully the pledge of them to Field, and reciting that the assignment was made subject to Field's claim. It further appeared that the certificates were expressed to be transferable by George W. Bond and by Field respectively, "on producing this certificate," and to be "subject to such conditions as are imposed by the by-laws of the company," the ninth article of which was as follows: "When any member of this corporation shall be desirous of selling any of his shares, he shall first offer the same to the directors of this company at the lowest price at which he will sell said shares; and if the company shall pay to him such price he shall thereupon sell and transfer said shares to the company or to whomsoever they may elect to receive the same; provided that if the company shall neglect to take and pay for said shares within six days after such offer, then they may be disposed of to any person, and no shares shall be transferred until the requirements of this by-law have been complied with." The other material facts are stated in the opinion.

The plaintiff waived all his claim or right in the seventy shares, and offered to transfer the same to the company. The judge ruled that the measure of damages was the value of the stock; and directed a verdict for the plaintiff for $10,782.80, being the amount of such value at the time of the alleged conversion, (assessed by an auditor whose finding was not disputed by either party,) with interest from that time. The defendants alleged exceptions.

T. Weston, Jr., for the defendants.

W. Allen & D. W. Bond, for the plaintiff.

CHAPMAN, C. J. The plaintiff was possessed of a certificate for twenty shares of the defendants' stock, duly assigned to him by a writing on the back of the same. He had also an assignment of fifty shares, which stood in the name of Albert Field, the president of the corporation, as collateral security for the payment of a note. He paid the note and took it up; and a receipt for the payment was written by Field's clerk in Field's name on the back of the certificate, which, with the note, the clerk delivered to the plaintiff. The treasurer of the corporation was present at the payment, and knew the facts. The plaintiff,

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having the papers with him, demanded a transfer and certificates made to him. This was refused by the treasurer, solely on the ground that the ninth by-law of the corporation had not been complied with.

The plaintiff contends, 1, that this by-law is invalid; 2, that it had been complied with, some time before, by an offer of the owner to sell the stock to them, and their refusal to purchase it. We think the correspondence between George W. Bond, the owner, and Job M. Leonard, the defendants' treasurer, shows that the by-law had been complied with. Therefore the question of its validity has become immaterial.

The defendants now contend that they were not bound to make the transfer, because Mr. Field, their president, was sick at the time of the plaintiff's demand and until after the action was brought, and could not sign a certificate. But their refusal was put on the sole ground that the by-law had not been complied with; and therefore the alleged sickness of the president is immaterial.

They also say that the plaintiff did not leave his certificates with the treasurer when he demanded his stock. But he had them with him, and gave the treasurer copies of his transfers, which was all that he required, and he still refused to make the transfer, on the sole ground that the by-law had not been complied with.

They say further that the plaintiff consented to a delay until the next week. But he did this upon the promise of the treasurer to send him the certificates at that time. The certificates were not sent, and no reply was made to his subsequent letter asking for a transfer. They cannot therefore justly contend that his consent to this delay was a waiver of his rights. He has made a proper demand, and it has been refused on a ground which was invalid. The stock having been unjustly withheld, he is entitled to recover its value. *Exceptions overruled.*

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JUSTIN THAYER & another *vs.* EDWIN BURCHARD & others.

A. wrote to B., a common carrier over one of two routes from the West, that he was about to buy grain in the West and wished to hear soon if B. was disposed to contract for its transportation, as he should buy in a different market for B.'s route than for the other. B. in reply stated his rates for carrying flour from the end of a canal to several towns. A. then wrote asking whether the rates applied to grain as well as flour, and whether B. would abate a discrimination in them against A.'s town. B. answered that he would carry A.'s flour and grain from the canal to that town at a given rate "to continue in force till close of navigation unless notice to contrary." A. replied the same day accepting the proposal. *Held*, that to ascertain the terms of the agreement regard was to be had to the whole correspondence, and not the two last letters only. *Held, also*, that, by the terms so ascertained, the relation of the parties was in the nature of an open proposition by B. to which A. might from time to time give effect as a contract by delivering flour and grain and calling for its transportation, and B.'s right to end which by notice was unqualified. *Held, further*, that after giving A. notice of a change of rates to take effect on a certain day, B.'s obligation to carry any of A.'s flour or grain at the former rates after that day was limited to such flour and grain as at the time of the notice had been delivered to B. by A. for transportation. *Held, further*, that such a notice of a change of rates to take effect in twelve days was reasonable without regard to the extent of A.'s purchases in the West, or the location of his flour or grain there purchased, or B.'s information concerning the same.

From the freight house at the station of a railroad corporation, which had agreed with A. to carry his grain over its road at a fixed rate of freight until notice to the contrary, a track extended into the yard of C.'s grain elevator, where C. received and stored the grain at A.'s expense until it was loaded into cars which from time to time the corporation ran into the yard and entrusted to C. to load from the elevator in such proportion as he pleased with grain of A. and of C.'s other customers. *Held*, that delivery at and reception into the elevator, of A.'s grain, accompanied with notice to the corporation that it was there to await transportation under the contract, were equivalent to delivery to and reception by the corporation at the freight house; but that possession by C. of A.'s grain otherwise, or elsewhere than at the elevator, had not such effect.

The rolling stock of a railroad corporation, though sufficient for its ordinary business during nine months of the year, was insufficient to carry promptly all the freight of a particular kind, requiring peculiar cars, in three months of a year in which it had made a special contract with a person to transport his freight of that kind without specifying any quantity to be transported or limiting any time for the performance of the service. During intervals in those months between days when he delivered freight to the corporation under the contract and the days when it was loaded on the cars by his storekeeper, into whose yard the corporation sent cars to be loaded at the storekeeper's discretion, he incurred expenses for storage and insurance on that freight. The cars sent to the storekeeper were more than sufficient to have carried all that freight alone so promptly as to have avoided such expenses; but the storekeeper loaded them with it only proportionally with similar freight of his other customers likewise awaiting transportation but with whom the corporation had no special contract. *Held*, that the fact that in those three months every year there was a great accumulation of such freight for transportation over the road was insufficient to render the corporation liable for those expenses on the ground of negligence in its equipment.

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CONTRACT by the firm of Thayer & Sergeant, grain dealers at Northampton, against the trustees of the bondholders of the Rutland and Burlington Railroad, in the use and occupation of that road as common carriers, to recover a portion of the price paid to them by the plaintiffs, under protest, for the transportation of grain from Schenectady in New York over the Rensselaer and Saratoga, Rutland and Burlington, Vermont Valley, Vermont and Massachusetts and Connecticut River Railroads, to Northampton and other places in Massachusetts on the line of the road last named; and for insurance and storage of grain and other expenses incurred by the plaintiffs, after October 1, 1866, in consequence of the defendants' delay to transport grain for the plaintiffs from Schenectady over that route before that date. In the superior court facts were agreed in substance as follows:

On June 22, 1866, the plaintiffs wrote from Northampton to Henry E. Chamberlin, the general freight agent of the defendants, that in the autumn they should have a large quantity of grain to come forward; that they wished to be in a position to ship "either way," by Buffalo or by Ogdensburg; and that, as they were about purchasing for future delivery, they would like to hear from the defendants at an early day, "if disposed to contract," as they should buy in a different market for the defendants' route than for the route by way of Ogdensburg. The next day, June 23, Chamberlin replied, offering to the plaintiffs "the same rates for flour as we gave other parties," specifying those rates per barrel from Schenectady to five places on the Connecticut River Railroad, in which specification a higher rate was charged for transportation to Northampton than to Chicopee or Springfield, and asking for advice if these rates should be satisfactory. The plaintiffs answered, June 26, stating that they supposed that the defendants intended to include grain "in car lots," although their letter of the 23d did not so state; that if the defendants would allow them the same privilege as to shipping which others took, it would be all that they asked, which was, to bill to Springfield grain designed for Northampton; that the "elevating charges" were more at Schenectady than at

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Albany, but at the defendants' Springfield rate the plaintiffs would ship over the defendants' route "what comes by canal;" and asking advice "whether tariff sent includes grain, and whether you will allow us to bill to Springfield." Chamberlin replied, June 30: "We will take your flour and grain, in full car loads of not less than ten tons, Schenectady to Northampton, for four dollars per ton. This rate to continue in force until close of navigation, unless notice to the contrary. If accepted, please advise me at once." On the same day the plaintiffs answered: "We are in receipt of your favor of even date, offering to transport our flour and grain in car loads not less than ten tons, Schenectady to Northampton, for four dollars per ton till close of navigation, unless we are notified to the contrary. We accept the proposition." The receipt of this acceptance was acknowledged by the defendants on July 5.

At the terminus of the Rensselaer and Saratoga Railroad in Schenectady the firm of Maxon & Co. kept a grain elevator, and the railroad "had a freight house in no way connected with said elevator except by a track over which the railroad company passed their cars into the yard of Maxon & Co., where they were taken by Maxon & Co. into their elevator, and loaded with grain by Maxon & Co. without special directions from the railroad company as to whose grain should be loaded in them." All the grain in controversy in this action was consigned from the West, by way of Buffalo and the Erie Canal, to "Thayer & Sergeant, Northampton, care of Maxon & Co., Schenectady," who "were the agents of the plaintiffs, as well as of very many other shippers over this line, and owned and controlled the elevator, and were charged with the duty of loading the cars when furnished by the defendants;" and "it was known to the plaintiffs that Maxon & Co. would only forward to them *pro rata* with their other customers, and was also known to the defendants that it was the custom of Maxon & Co. to forward grain to all their customers, and not to one customer to the exclusion of others."

The first boat load of grain which arrived at Schenectady for the plaintiffs was taken by Maxon & Co. into the elevator on

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August 28; the second on August 29; the third and fourth on September 17; the fifth on September 20; the sixth on September 21; and the seventh on September 22; and "said three last named boat loads arrived at Schenectady at some time prior to the respective dates when they were thus taken into the elevator, but not more than three days prior to said respective dates." The average quantity of grain to the boat load was about 8000 bushels. On September 10, there were also taken into the elevator for the plaintiffs upwards of 6000 bushels not included in the boat loads. "The capacity of the elevator was about 150,000 bushels, and when the first cargo for the plaintiffs arrived at Schenectady the elevator was from one third to one half filled with grain, and it continued gradually to increase until it became filled about September 17."

The following correspondence occurred between the parties subsequently to entering into the contract; and was submitted as part of the agreed facts, "subject to its legal effect, — its relevancy and competency to be determined by the court," it being conceded, however, "that the defendants were informed by the plaintiffs that all the grain in controversy had arrived at Schenectady on September 18, or very near then, as appears by the correspondence."

On September 5, the plaintiffs wrote to Chamberlin: "We have 16,000 bushels corn already at the elevator. The same amount leaves Buffalo to day, due there say ten days hence. We wish it forwarded at the earliest moment. And we have 24,000 bushels now afloat on Lake Erie for same point. In all, some 66,000 to 70,000 bushels grain. Maxon informs us he is short of cars. Will you do what you can to help it along? We rely on your help to get it forward. Please let us hear what the prospect is." On September 15, they wrote again: "We have no reply to ours of September 5 about cars. Maxon writes us that your road do not furnish their proportion. Our second 16,000 bushels is due there to-day, and we wish to push it forward as soon as possible. With the 24,000 more now on the canal, which will arrive next week, we can furnish occupation for all the cars you can furnish for some time to come.

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Please see what you can do for us, and write to us what to expect." On September 17, Chamberlin replied: "We are very short of cars. Customers from all points are calling for them daily. I am doing, and will continue to do, all I can to accommodate you;" and asked if the plaintiffs could not induce the Connecticut River Railroad to forward grain cars to Schenectady. The next day, September 18, Chamberlin wrote to the plaintiffs: "On and after October 1 next, rate for grain in car loads from Schenectady to all points on Connecticut River Railroad will be twenty-eight cents per 100 lbs." The plaintiffs, on September 19, acknowledged receipt of Chamberlin's letter of the 17th, and wrote in reference to it: "Our customers are urging us daily for the grain, which is ready for you. We will do all we can to assist you in the matter of cars, and see that they are promptly discharged;" and they added: "We have also yours of the 18th, advising us of an advance of rates October 1. Our grain is ready for shipment, and we shall depend on its being got forward previous to that date." On October 6, they wrote to Chamberlin again: "We notice that all grain coming forward since October 1 is waybilled at twenty-eight cents per hundred. As this will only make the roads a world of trouble in correcting accounts, we write to ask you to instruct railroad agent at Schenectady to bill at contract prices, to save so much altering bills. He probably is not aware of the contract. Please also have him send corrected freight bills for what has already gone forward. All our grain there was bought, sold and shipped previous to your notice." On October 19, they again wrote: "We have no reply to ours of October 6 requesting you to alter freight bills on the grain contracted at twenty cents per 100 lbs. Please advise us what course to pursue in the matter. We saw Mr. Phelps of Connecticut River Railroad a few days since. He understands the matter as you do, that the grain in before your advance went into effect is on the old contract price of twenty cents per 100 lbs.; still all the bills come charged at twenty-eight." Chamberlin answered, October 22: "I do not think that you have any legal claim upon us to freight any grain at twenty cents per hundred after October 1. Still, so far as

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this road is concerned, we should be willing to take all grain and flour you had at Schenectady awaiting shipment at the time notice of advance in rates was given (September 18) at the price then in force. Freight record at Schenectady subsequent to the notice should be subject to the advance after October 1. Mr. Marcy, of Rensselaer and Saratoga Railroad, is opposed to taking any grain whatever at four dollars since October 1. If you will give me statement showing amount on hand at Schenectady September 18, and the balance of that amount left over October 1, I will endeavor to get deduction made." The plaintiffs answered, October 29, that they had no doubt of their "legal as well as moral claim to the carrying out of the freight contract," but wished to avoid litigation; that they inclosed Maxon & Co.'s statement of the amount of grain in their hands September 17, and the amount shipped from September 17 to October 1, "leaving balance in their hands October 1, subject to contract rate of twenty cents per 100 lbs.," of 43,877 bushels; and added: "Mr. Maxon informs us that, had cars been provided, he could and would have loaded the grain previous to October 1. He also informs us that Mr. Marcy informed him that, in case you had contracted with us, he was disposed to carry out the contract, but understood from you that no such contract existed. We think he must have misunderstood you, and refer you to your letter to us dated June 30." Chamberlin replied, November 2: "It seems to me that we stand in the same relation to you that we do to all other parties having freight to ship from Schenectady at the time the advance was made. Your contract expired, by notice, October 1. By your interpretation, you would oblige us to take your grain all winter at four dollars, if you could get sufficient quantity at Schenectady, before 'close of navigation,' to keep us running. I was disposed to take all grain that you had at Schenectady at the time of notice, September 18, at the contract rate, and did everything I could to furnish cars for you to get it away before October 1. I sent your letter of the 29th to Mr. Marcy of the Rensselaer and Saratoga Railroad, and he writes, 'In this case the grain is not delivered to us until loaded into our cars. We

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decline to take any they have there at less than tariff rates.' You see there is no 'misunderstanding.' I am unable to make any deduction from tariff rates on shipments since October 1." The correspondence closed with a letter from the plaintiffs to Chamberlin, without date, as follows: "We are in receipt of your favor of November 2, in which you decline to take our grain which was at Schenectady awaiting shipment at the time your advance in freights, October 1, went into effect, at less than twenty-eight cents per 100 lbs., which grain being contracted at twenty cents per 100 pounds, we shall pay the freight bills as charged, reserving our rights under the contract we hold with you, and wish it distinctly understood that in so paying them we do not waive our claim to have the grain transported at contract rates, viz: twenty cents per hundred pounds, for the amount that was ready for transportation at the time the advanced rates went into effect."

It was further agreed that of the plaintiffs' grain received at the elevator before October 1, as above enumerated, fifteen car loads, comprising one hundred and fifty-three tons, were forwarded from Schenectady to the plaintiffs before September 18; and twenty-six car loads, comprising two hundred and seventy-eight tons, between September 18 and October 1; leaving upwards of twelve hundred and ten tons of their grain in the elevator on October 1, of which, after that date, and mostly before December 1, eight hundred and twenty-eight tons were forwarded to them at Northampton and the rest to other places on the line of the Connecticut River Railroad, the price of twenty-eight cents per 100 lbs. being charged by the defendants on all of it, and paid by the plaintiffs under protest, the difference between the rate thus paid by them and the rate of twenty cents per 100 lbs. on the twelve hundred and ten and more tons being $1936.08, and the amount paid by them to Maxon & Co. for storage of the grain after October 1 being $479.09, and for insurance thereon, $222.36; all of which three sums the plaintiffs contended that they were entitled to recover. And finally it was agreed that "the line had many more than sufficient cars to have transported the grain in question between September 18

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and October 1, had they been devoted to that service alone; that from forty to fifty cars in constant service would have been sufficient to transport said grain between those dates; that from September 1 to October 1 the defendants sent to Maxon & Co. two hundred and nineteen cars to be loaded, without any instructions as to whose grain should be put in them; that there were about one hundred and twenty-five car loads of the plaintiffs' grain in all delivered at the elevator during said period; that the defendants did not know the actual amount of grain remaining in the elevator at the date of the notice, not knowing how much had then been forwarded, and took no pains to inform themselves on that subject; that the defendants had no written or special contracts with any of their customers, except the alleged contract in question with these plaintiffs; that the same rates for freight were charged to all the customers of the defendants which were charged to the plaintiffs under their alleged contract prior to October 1, and at that date the advance in the defendants' charges for freight applied as well to all their customers as to these plaintiffs; that a larger proportion of cars according to the tonnage was devoted to the grain business than to any other branch of business carried on by the defendants during said fall and winter of 1866, but not a larger proportion than is usually devoted to that business in the grain seasons; and that the defendants and said connecting roads had a sufficient equipment for their ordinary business, except during the months of September, October and November, prior to the close of navigation, when there is an unusual amount of business, requiring for its prompt performance a larger number of cars than is required for the ordinary business of said roads."

Judgment was ordered for the defendants; and the plaintiffs appealed.

C. Delano, for the plaintiffs. 1. As the contract grows out of a correspondence, all the letters which throw light upon the subject matter and intention of the parties are admissible to aid in its construction. Chit. Con. (10th Am. ed.) 88. *Nash* v. *Towne*, 5 Wallace, 689, 699. *Sumner* v. *Williams*, 8 Mass. 214. *Stover* v. *Metzgar*, 1 W. & S. 269. *Mactier* v. *Frith*, 6 Wend. 103.

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Fowle v. *Bigelow*, 10 Mass. 379. *Cunningham* v. *Parks*, 97 Mass. 172.

2. When, therefore, the defendants contracted to carry flour and grain for the plaintiffs from Schenectady to the places on the line of the Connecticut River Railroad, in car loads of not less than ten tons, at four dollars per ton, till the close of navigation, "unless notice to the contrary," they did so in full view of the change of situation it involved to the plaintiffs, (a change of market as well as of route and means of transportation, and the inevitable accumulation of large quantities of grain at Schenectady,) and by "notice to the contrary" they must have been understood to intend a reasonable notice, which would seasonably warn the plaintiffs against any further shipments of grain to Schenectady. Chit. Con. (10th Am. ed.) 79, 801. *Adams* v. *Foster*, 5 Cush. 156. *Spooner* v. *Baxter*, 16 Pick. 409. *Graddon* v. *Price*, 2 C. & P. 610. *Brighty* v. *Norton*, 3 Best & Smith, 305. *Baker* v. *Mair*, 12 Mass. 121. *Atwood* v. *Emery*, 1 C. B. (N. S.) 110. The ordinary rule that a deed or other instrument shall be taken most strongly against the grantor or contractor calls for such a construction. Chit. Con. (10th Am. ed.) 99. *Barney* v. *Newcomb*, 9 Cush. 56. *Mayer* v. *Isaac*, 6 M. & W. 612. The defendants, having by their offer so induced the plaintiffs to change their situation, were equitably estopped to increase the rates of freight on grain *in transitu*. *Dewey* v. *Bordwell*, 9 Wend. 65. On the defendants' construction of the contract, it would have been competent for them, even when the first boat loads were arriving, to abruptly terminate the contract, and exact the highest rates; which would have been a fraud differing only in degree from that which they did actually commit. They also acted unreasonably in giving their notice, in that they took no pains to inform themselves of the amount of grain in the elevator at the time, or of their ability to move it before the notice would take effect.

3. Assuming then that a reasonable notice would require the defendants to carry at contract rates all the grain that had arrived or was arriving at the date of the notice, a reference to the agreed facts, as well as to the plaintiffs' letter of October 29,

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called for by the defendants' letter of October 22, shows that of the plaintiffs' grain in Maxon & Co.'s hands on September 17 there remained after October 1 a balance of 43,877 bushels, on which the defendants charged the excessive eight cents per hundred lbs.

4. The defendants, whether in virtue of their common law liability as common carriers, or their liability under their contract, were bound to carry with reasonable diligence; and they distinctly admit that, though they knew that in the months of September, October and November, there was an unusual amount of business, requiring for its prompt performance a larger number of cars than for other months, yet they did not provide an equipment sufficient for the exigencies of those months. They are liable therefore for the extra charges for storage and insurance. *Taylor* v. *Great Northern Railway Co.* Law Rep. 1 C. P. 385. Hand, J., dissenting, in *Wibert* v. *New York & Erie Railroad Co.* 2 Kernan, 257.

S. T. Spaulding, for the defendants.

WELLS, J.* This action is founded upon an agreement relating to rates of freight, for transportation of flour and grain over a line of connecting roads. The agreement was effected by means of correspondence. The defendants contend that the terms of the agreement are to be sought only in the final letter of each party, in which the negotiation terminated by a certain proposition made and accepted; that the previous letters are merely preliminary, and, not being referred to in the final proposition, form no part of the contract which resulted from the correspondence, and therefore cannot be used to enlarge or explain its meaning and application.

If the correspondence had been followed by a formal written agreement, covering the whole subject matter, complete in itself and unambiguous in its terms, the position of the defendants might be correct. But that is clearly not the case here. Although the defendants' letter of June 30 does not expressly refer to the previous correspondence, it is manifestly based upon it,

* FOSTER, J., did not sit in this case.

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and requires its aid to give full significance to the letter itself. The correspondence is continuous and consecutive in its relation to the subject, and in legal contemplation is contemporaneous; as much so certainly as verbal negotiations begun in the morning and resumed and completed at evening. *Cunningham* v. *Parks*, 97 Mass. 172.

Taking the correspondence together, it is apparent that the expression "We will take your flour and grain" refers to the flour and grain purchased and to be purchased by the plaintiffs for transportation to various points on the Connecticut River Railroad, and to be delivered to the defendants at Schenectady, by way of the Erie Canal or the New York Central Railroad. It is evident also that the proposition to deliver at Northampton was not intended to be exclusive of the other points upon the Connecticut River Railroad which had been mentioned in their previous letter of June 23. In that previous letter the defendants had made a discrimination against Northampton, as compared with the other places mentioned. The plaintiffs' letter of June 26 is devoted mainly to the discussion of that difference. The special mention of Northampton in the defendants' letter of June 30 indicates that the defendants conceded that point, and made the rate for Northampton correspond with that for the other places, and thus to represent the whole in the proposition which they made and which the plaintiffs accepted.

The contract relates only to the rates of freight. It does not import any other change in the relations of the parties. It does not impose any additional duty upon the defendants, to receive and transport without delay the plaintiffs' goods, than they were already under as public carriers. Neither does it apply to any definite amount of business or quantity of goods to be so transported. The plaintiffs did not, by their acceptance of the terms, engage to furnish goods for transportation. Although they should purchase goods for that purpose, they might, at any time before their delivery at Schenectady and notice to the defendants to transport them, divert them to another route. Until such delivery and notice, there was no mutuality of obligation. The matter stood, in this respect, as upon an open

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proposition by the defendants, which the plaintiffs might make operative as a contract by delivering goods and calling for their transportation. To extend the obligation of the defendants beyond that limit would leave it, as it seems to us, without limit and without mutuality.

It is contended that the information that the plaintiffs would be governed, in their purchases at the West, by the result of these negotiations, made it incumbent upon the defendants to transport all goods at the agreed rate, which had been purchased with a view to such transportation; or at least all that were actually *in transitu* before notice of a change of rate. But the contract makes no such proviso. Nor does it even provide that all goods arrived at Schenectady, when such notice is given, shall be carried at that rate. No length of notice is stipulated for, and no reservation in favor of goods ready for transportation at the time of such notice. The absence of any such express proviso is significant against the construction contended for. Aside from express agreements, a carrier may always charge a reasonable compensation for every service performed. He may refuse to receive goods for transportation unless such reasonable compensation be paid. Goods received and transported must be carried at the customary rates previously charged, because the parties will be presumed to have contracted with reference to those rates, until notice of a change is given, either public or personal. *Fitchburg Railroad Co.* v. *Gage*, 12 Gray, 393.

In this case, the notice given was reasonable, and all that was required by the terms of the contract. The only question is, whether the transactions between the parties, previous to the notice, were such as to make that contract attach to any particular quantity of goods, so that the obligation of the defendants became absolute to transport them at the agreed rate notwithstanding notice of an advance of rates.

The course of business between the parties was this: The plaintiffs' grain, on arrival at Schenectady, was transferred and received into the elevator of Maxon & Co., where it remained on storage until loaded directly from the elevator into the cars by which it was to be transported to the plaintiffs. For this

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purpose a track was laid from the freight house of the Rensselaer and Saratoga Railroad (which road formed part of the line in whose behalf the contract was made) into the yard of Maxon & Co. When cars were furnished for this transportation, they were run by this track into the yard of Maxon & Co., and by them taken into the elevator and loaded. Maxon & Co. performed the same service for other parties, as well as for the plaintiffs; and the order in which the grain of their several customers should be forwarded was determined by them, and not by the railroad company. This arrangement relieved the railroad company from the necessity of making extensive provisions for transferring freight, and storing it while delayed for want of cars, and imposed the expense of storage upon the owners. But we think that the arrangement was so far a substitution of the elevator of Maxon & Co. for freight houses of its own, that, under an express contract for the carriage of goods at a fixed rate until notice to the contrary, a delivery of grain at and its transfer into the elevator, accompanied by notice from the owner that it was so delivered and stored, in readiness and for the purpose of being transported upon the terms of the contract, were equivalent to a delivery to and acceptance by the railroad company itself, at its own freight house. After the goods had been so received, it was too late, as to those goods, to give notice of an increase of rates. The contract for transportation at four dollars per ton attached to them, notwithstanding its termination for all other purposes, before they were actually carried over the road. But the plaintiffs could not, after such notice and before the time fixed for the advance of rates, proceed to accumulate grain at the elevator beyond the capacity of the railroad to receive and transport, and require that all grain so accumulated before October 1 should be transported at the same rate after that time.

Upon the question of liability on the ground of delay, it does not appear from the agreed facts that the defendants were in fault, either in respect to the proper equipment of their roads, or their facilities for doing the ordinary business of that route; or in the manner in which they applied such means as they had to

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the performance of the extraordinary amount of service which was pressing upon them at that season. They were not bound by their contract, nor would they have been justified by their duties as public carriers, to have devoted all their cars, or an undue proportion of them, to the carriage of the plaintiffs' grain by the exclusion of others. And besides, the disposition of the cars which they were able to furnish was not made by them, but controlled by Maxon & Co., who were agents of the plaintiffs in that respect. For losses, expenses, or other damage arising from mere delay, occasioned by a temporary excess of business, and without fault, the carrier is not responsible. *Wibert* v. *New York & Erie Railroad Co.* 2 Kernan, 245. *Parsons* v. *Hardy*, 14 Wend. 216. *Taylor* v. *Great Northern Railway Co.* Law Rep. 1 C. P. 385.

The plaintiffs are entitled to recover the amount paid by them in excess of the rate of four dollars per ton, for all grain which had been received at the elevator and transferred into the possession and control of Maxon & Co. for the purpose of transshipment upon the defendants' line of railroad, before notice was given of the proposed change of rates. The agreed facts do not enable this court to determine for what amount judgment should be rendered, upon the principles above stated. This must be ascertained in the superior court in such manner as that court shall direct; and thereupon judgment is to be entered according to the result. As there is apparently something due to the plaintiffs,

The judgment for the defendants in the superior court must be set aside.

After the foregoing decision, the case was submitted, in the superior court, by agreement of the parties, to *Scudder*, J., without a jury, to determine the amount for which the plaintiffs were entitled to judgment; and he made the following report:

"It appears that at the date of the notice of September 18 there were actually in the elevator of Maxon & Co., at Schenectady, five hundred and forty-two tons of corn on which the plaintiffs are entitled to recover an overcharge of one dollar and

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sixty cents per ton, with interest from the date of the plaintiffs' writ, no prior date of payment or demand having been proved or agreed upon; in all, the sum of $978.49. The plaintiffs further claimed to recover at the same rate on three boat loads of corn, containing two hundred and twenty tons each, which they contended had been shipped, and were on the way, or had arrived at Schenectady, before the notice of September 18 had been given, but which had not been actually taken into the elevator of Maxon & Co.; and upon this claim they offered testimony, which was objected to by the defendants as irrelevant and inadmissible, but which was taken, at the request of the plaintiffs, subject to the opinion of the court as to its admissibility and effect." The report then recited the testimony in full, and continued: "Upon this testimony the court find that neither of said three boat loads had been received at the elevator of Maxon & Co., and transferred into their possession and control for the purpose of transshipment on the defendants' line of railroad before notice was given of the proposed change of rates; and that the plaintiffs are not entitled to recover the overcharge claimed upon the cargoes of said boats or any one thereof. The court accordingly find that the plaintiffs are only entitled to recover of the defendants the sum of $978.49 before stated, and for that sum the plaintiffs are entitled to judgment."

Part of the testimony of the plaintiff Sergeant recited in the report was to the effect that he did not know whether the defendants' notice of the increase in the rates of freight was received by the plaintiffs on September 18 or September 19, but he thought it was received on September 19 about six o'clock in the afternoon. There was also testimony of a member of the firm of Maxon & Co. that they received from Buffalo the bills of lading of the three boat loads not later than September 13, and their usage was to hold cargoes for their charges and back-charges; that the three loads were taken into the elevator on September 20, 21 and 22; that they paid no charges on these cargoes till taken into the elevator; and that "by paying the back-charges the plaintiffs could have placed these boat loads wherever they pleased." And further, there was testimony of

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the captain of the Anan Harmon, one of the three boats, that he arrived at Schenectady, with his boat, on the evening of September 18, and on the morning of the 19th gave Maxon & Co. notice of his arrival.

A bill of exceptions, preferred by the plaintiffs and allowed by the judge, set forth this report, and was in substance as follows:

"In addition to the testimony recited, the plaintiffs relied on the evidence contained in the agreed statement of facts and letters used at the former hearing before the supreme judicial court, and also offered evidence tending to show that the three boat loads of corn referred to in said agreed statement as having been put into the elevator on the 20th, 21st and 22d of September were the same 24,000 bushels referred to in the plaintiffs' letter of September 5 as "afloat on Lake Erie," and again referred to in their letter of September 15 to which the defendants' letter of September 17 was in response. The plaintiffs contended that if the court should be satisfied that these three boat loads, or one or more of them, had been shipped from Buffalo to Maxon & Co., who held the bills of lading as security for their own as well as for back-charges, having a lien on the cargoes therefor, then in law they were so far within the custody and control of Maxon & Co., as agents of the plaintiffs, and also, for certain purposes, of the defendants, that the notice of September 18 would not relieve the defendants from carrying at the lower rate whatever had been so shipped, even though not put in the elevator at the date of the notice. The plaintiffs also relied on the letters above specified, and all the other letters contained in said agreed statement, and insisted that the defendants, by not declining to carry at the lower rate when first advised that the 24,000 bushels were *in transitu* for Schenectady, were estopped afterwards to give a notice which would take this corn out of the contract price. The plaintiffs also offered to show that, relying on the defendants' agreement to carry at the lower rate, they had, before receiving said notice, made contracts to deliver the greater part of said grain to different customers along the line of connecting roads covered by the defend-

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ants' contract, and contended that the grain so contracted for was not subject to the higher rates. The plaintiffs also asked the court to rule that, if the Anan Harmon arrived at Schenectady on the evening of September 18, and the defendants' notice of the 18th was not received by the plaintiffs till after business hours on that day, that boat load would not be subject to the advanced rates. But the court, in view of the opinion of the supreme judicial court already delivered in the case, declined to treat or regard any portion of the three boat loads above mentioned as subject to the lower rates of contract, and assessed the damages at the amount stated in said report."

These exceptions were argued at September term 1869 by the same counsel.

WELLS, J. The rulings of the superior court appear to us to be in precise accordance with the decision previously made in this case. The contract between these parties gave the defendants an unqualified right to terminate it by notice. No length of notice was stipulated for, and no reservation in favor of grain about to arrive. The plaintiffs could not, by their own arrangements of business, or by their contracts with other parties, restrict this right of the defendants; nor could they, by informing the defendants of their arrangements and expectations in regard to the receipt of freight over the canal, modify that right, or impose upon the defendants any different obligation from that which their contract expressed.

The ground on which grain already received at the elevator of Maxon & Co., with notice to the defendants that it was there for transportation, was held not to be subject to the increased rates, was, that such receipt and notice were equivalent to a delivery to the defendants for that purpose. By their arrangements and mode of use, the defendants had made the elevator of Maxon & Co. a sort of substitute for warehouses of their own. It was the fact that the grain was there stored and awaiting the convenience of the defendants to transport it, which deprived the defendants of the right to affect such grain by notice of a change of rates. Any rights which Maxon & Co. might acquire in or to the property by contract with the plaintiffs, or by

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virtue of charges or advances made upon it, would have no bearing upon the question. Constructive possession by them, as consignees, could in no way affect these defendants. Actual possession by them, otherwise or elsewhere than at their elevator, would be ineffectual to modify the obligations of the defendants in respect to its transportation. Actual delivery of the grain at a place designated or assented to by the defendants for the purpose, with a request for its transportation, was such an offer of freight under the contract as required its transportation upon the terms of that contract, and made a notice of change of rates then too late. But, until such delivery and request, the obligation of the defendants could not be made absolute by any contracts or arrangements of the plaintiffs with other parties.

Upon the facts reported, and the findings of the superior court thereon, it is to be taken as conclusively established that no one of the boat loads, about which the controversy is now pending, had been so delivered and received before the receipt of notice of the change of rates. *The exceptions are therefore overruled.*

CHARLES R. COPELAND & others *vs.* INHABITANTS OF HUNTINGTON & others.

SPENCER WHITE & others *vs.* INHABITANTS of GRANBY & others.

To bring proceedings of a city or town within the clause of the St. of 1866, c. 70, excepting from the operation of the repeal of the St. of 1865, c. 152, "proceedings already begun in any city or town for reimbursement, under said act," to individuals of money contributed by them to fill its quota of troops, there must have been, before the time when the repealing statute took effect, either the borrowing of money, or the creating of a legal debt against the city or town, or a vote sufficient to warrant the assessors in proceeding to lay a tax to raise money, for the purpose of reimbursement.

No previous delay of the taxable inhabitants of a town to complain, on the Gen. Sts. c. 18, 79, against the payment from its treasury of money for a purpose other than those for which it has the legal right and power, will bar the right of the complainants to a remedy on the statute, if their petition is filed or their suit commenced before the money is actually paid.

TWO PETITIONS on the Gen. Sts. c. 18, § 79. The first, by ten taxable inhabitants of Huntington, filed May 18, 1867, was for

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an injunction on the treasurer of the town against paying orders drawn upon him by the selectmen, made payable June 1, 1867, "to numerous individuals who had contributed money in aid of the quotas of said town for the year 1864," and issued under votes passed at a town meeting on May 24, 1865, "to refund and pay back all moneys contributed and paid by individuals in aid of and for the purpose of filling the quotas of the town under any requisition, order or call of the President or of the war department of the United States during the year 1864," and "that the selectmen audit all accounts as above, and give the town-orders for the same payable in two years after June 1, 1865, without interest." The answer alleged that the town on March 12, 1866, voted "to raise $3000 in addition to what has already been raised for town expenses," and on March 11, 1867, voted that "the treasurer be authorized to borrow any sum of money not to exceed $10,000;" that both votes "were passed to provide money for the payment of said orders inclusive of other town expenses," and that "the treasurer has borrowed money under said vote [of March 11, 1867,] to enable him to meet said orders when due." The answer further alleged that each order was made payable to the order of the person in whose favor it was issued, and was expressed to be "for money paid for volunteering purposes;" and that "the said orders have been largely negotiated, and have been and are now held by third parties, into whose hands they have come in the course of regular and legitimate business transactions, and who have given value for them." Issue was joined on the answer, and all the facts therein alleged were admitted by the petitioners at the hearing, before *Gray*, J., by whom the case was reserved for the determination of the full court.

A. M. Copeland, for the petitioners.

G. H. Knapp & E. H. Lathrop, for the respondents.

The second, by fifteen taxable inhabitants of Granby, was for an injunction on the collector of the town against collecting, and on the town treasurer against paying out moneys collected, in pursuance of a vote of the inhabitants passed at a town meeting April 1, 1867, to "raise by tax the sum of $2734.50 to

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refund to individuals money subscribed and paid by them to procure men for the army and navy under calls made by the President of the United States during the year 1864;. to carry out a vote passed in town meeting November 7, 1865," which was as follows: "That the town assume the amount subscribed by individuals to procure men for the army and navy under the several calls of the President of the United States during the year 1864." The answer alleged that, pursuant to a vote of the town passed at the meeting of April 1, 1867, the assessors had assessed said sum of $2734.50, in addition to other amounts appropriated by the town, amounting in all to $9,518.92, on the polls and estate liable to be assessed in the town, and delivered to the collector their warrant for collecting the same; and that the collector, before the issue of a temporary injunction ordered by the chief justice to issue upon the petition, "had collected $4900 of said total assessment, and has been hindered and delayed in the due collection of the residue of said tax by the obstructions and delays, by injunction and otherwise, interposed by the petitioners, and from this cause and no other have the respondents failed to collect and pay over the moneys intended for the reimbursement and indemnity of said subscribers." The injunction was afterwards modified so as to permit the collection of the tax to be completed, the sums in question to be held by the treasurer subject to the further order of the court. Issue was joined on the answer, and the facts above recited were substantially established in the proofs at the hearing before *Gray*, J., who reported the case to the full court for determination.

W. Allen, for the petitioners.

C. Delano, for the respondents.

Foster, J. No one will contend that towns in this Commonwealth possess any power not conferred by express legislation to reimburse money paid by individuals for recruiting purposes during the war to suppress the rebellion. It was permitted to be done by the St. of 1865, *c.* 152,* which became a law April

* "§ 1. Any town or city may raise, by taxation or otherwise, such sums of money as may be necessary to pay and refund any money which has already

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25, 1865. But this act was in terms repealed by the St. of 1866, c. 70,* which took effect March 12, 1866. The only saving clause is found in the second section of the last act, providing that the repeal "shall not affect proceedings already begun in any city or town for reimbursement" under the first statute.

We are now called upon to construe this saving clause, and to determine what are to be deemed to be proceedings begun for reimbursement while the statute of 1865 was in force. The power conferred by this statute was qualified and conditional. The money might be raised by taxation or otherwise; but only, provided that all sums raised under the act should be assessed and paid within three years from its passage.

In our opinion, there must have been either the borrowing of money, or the creating of a legal debt against the town, or a vote sufficient to warrant the assessors in proceeding to lay a tax to raise money for the purpose of reimbursement. We think nothing less can be fairly held to be a commencement of proceedings for reimbursement sufficient to prevent the operation of the repealing act. A mere vote to reimburse, without any such steps as place the town under a legal obligation to do so, is insufficient, unless money is raised or borrowed, creating a fund for the purpose, or at least an assessment is voted. Without some such decisive action, the whole matter remained executory, and liable to reconsideration; and any preliminary and inchoate measures which a town may have adopted were swept away by the repealing act.

To apply the foregoing rule to the facts in the two cases now before us, we find that the town of Huntington passed a vote

been paid and applied by such city or town, or contributed by individuals, in aid of and for the purpose of filling its quotas, or furnishing men for the present war, under any requisition, order or call of the President or of the war department of the United States during the year eighteen hundred and sixty-four: provided, that all sums raised under this act shall be assessed and paid within three years from its passage."

* "§ 1. Chapter one hundred and fifty-two of the acts of the year eighteen hundred and sixty-five is hereby repealed. § 2. This act shall not affect proceedings already begun in any city or town for reimbursement under said act."

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to reimburse, and directed the selectmen to give orders on the town treasurer in favor of the contributors to the recruiting fund, which orders were payable in two years without interest. But these orders created no debt against the town. If negotiable in form, their nature was apparent on their face, and every holder had notice of their legal character. There was no mode by which any person could enforce them against the town at law or in equity. As this was all that had been done when the repealing act took effect, we are of opinion that it was not subsequently competent for the town to proceed to raise or pay out money under the votes.

The town of Granby in November 1865 passed a vote to raise money to refund to individuals their contributions; but specified no sum, and voted no assessment of a tax. Everything remained *in fieri* at the date of the repealing act.

In neither case had enough taken place to bring the proceedings within the saving clause. Neither town had raised any money, or assessed or voted, so that its assessors could proceed to lay, any tax; nor had either town contracted any debt or binding obligation under the St. of 1865, when it was repealed.

We do not regard the delay in filing either of these petitions as amounting to laches, or barring the rights of the petitioners. The remedy given by the Gen. Sts. *c.* 18, § 79, on the application of ten taxable inhabitants, need not be resorted to till money is about to be paid illegally out of the town treasury. It is the improper expenditure of the money which does the principal injury. *Decrees for the petitioners.*

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FRANKLIN COUNTY.

JAMES JARVIS *vs.* ROBERT B. MITCHELL & trustee.

A plaintiff in a trustee process, in whose favor final judgment is rendered against the principal defendant, but the trustee discharged, in the superior court, and who, after appealing from the discharge of the trustee, takes out execution in that court against the principal defendant, thereby waives his appeal.

TRUSTEE PROCESS. In the superior court, judgment was rendered for the plaintiff against the principal defendant; and the trustee was discharged. From the order discharging him the plaintiff appealed, and, pending the appeal, took out execution on his judgment against the principal defendant; but never placed it in the hands of an officer for service. Upon these facts (which were agreed in writing by the parties as a substitute for more formal proof) the trustee now moved to dismiss the plaintiff's appeal.

D. Aiken & W. S. B. Hopkins, (*C. C. Conant* with them,) for the trustee.

G. W. Bartlett, for the plaintiff.

GRAY, J. The decision of the question presented by this motion must be governed by the statutes of the Commonwealth, and little light can be obtained from other laws upon the subject. Although our proceeding by trustee process was doubtless derived from the ancient custom of foreign attachment in London, it differs from that in many important particulars, and among others in the form and effect of the judgment.

In proceedings under the custom of London, the defendant is not personally served with notice of the action, and cannot appear and defend without putting in special bail to dissolve the attachment; if he does not appear and give bail, the judgment is limited in its effect to the debt due to him from the garnishee; if he does, the attachment is dissolved, and the judgment is against him only. *Tamm* v. *Williams*, 3 Doug. 283. *Day* v. *Paupierre*, 13 Q. B. 802. *Mayor & Aldermen of London* v. *Cox*, Law Rep. 2 H. L. 265, 266. Drake on Attachment, §§ 1, 4, 5.

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The Prov. St. of 32 Geo. II. (Anc. Chart. 614); the St. of 1788, *c.* 16, § 4; and the St. of 1794, *c.* 65, revising the whole subject, and drawn, as we learn from Mr. Dane, by Chief Justice Parsons; 6 Dane Ab. 496; followed in many respects the English custom, and required a summons to be left at the defendant's last and usual place of abode, if any, in Massachusetts, and authorized a judgment against him, upon which execution might issue against any person summoned as trustee in the suit. The form of the writ, as established by the St. of 1794, *c.* 65, § 1, and confirmed by the Rev. Sts. *c.* 109, § 3, and Gen. Sts. *c.* 142, § 3, is in the ordinary form of a writ of summons and attachment, with a further direction to the officer to summon the alleged trustee to show cause why execution to be issued upon such judgment as the plaintiff may recover against the principal defendant should not issue against his goods, effects and credits in the hands of such trustee; and the execution contains a corresponding recital. St. 1794, *c.* 65, § 5. Under the St. of 1794, it was not necessary to render any judgment against the trustee, but his liability, if he did not pay over the funds in his hands on the execution, was left to be settled upon *scire facias* against him. *Dyer* v. *Stevens*, 6 Mass. 389. *Bickford* v. *Boston & Lowell Railroad Co.* 21 Pick. 110.

But, by the more recent statutes, any person summoned as trustee and found chargeable is to be "adjudged trustee in the original suit," and although the amount for which he is chargeable need not be specified in the judgment, but may be left to be ascertained upon *scire facias*, yet it may be and often is ascertained before the first judgment, and, if actually so tried and determined, the plaintiff is not entitled as of right to contest it anew upon *scire facias*. Rev. Sts. *c.* 109, §§ 38, 42, 43. Gen. Sts. *c.* 142, §§ 32, 33, 39. *Collins* v. *Smith*, 12 Gray, 436. *Brown* v. *Tweed*, 2 Allen, 566. "The judgment against a trustee" discharges him from all demands by the principal defendant for money paid by him on the execution "by force of such judgment," if the judgment is valid on its face, even if it was erroneous, and he did not appeal. Rev. Sts. *c.* 109, § 47. *Burnap* v. *Campbell*, 6 Gray, 241. *Morrison* v. *New Bedford Institution*

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for Savings, 7 Gray, 270. *Wheeler* v. *Aldrich*, 13 Gray, 51. *Dole* v. *Boutwell*, 1 Allen, 286. *Webster* v. *Lowell*, 2 Allen, 123. Gen. Sts. *c.* 142, § 37. If "he is adjudged trustee," he may retain, out of the funds in his hands, his costs and charges, as ascertained and taxed by the judgment of the court; and if the amount for which he appears by his answer to be chargeable is insufficient to pay his costs, he is entitled to judgment and execution immediately against the plaintiff for the balance, without waiting for a *scire facias* to be brought against him. Rev. Sts. *c.* 109, § 50. *McLaughlin* v. *Western Railroad Co.* 12 Cush. 131. St. 1845, *c.* 188. *Miller* v. *Carrier*, 11 Gray, 19. Gen. Sts. *c.* 142, § 61. There is nothing in these provisions to authorize separate judgments against the principal defendant and the trustee. On the contrary, they all contemplate that the determination of the question whether the trustee is chargeable at all, as well as upon the amount of his liability, so far as it is to be ascertained before bringing *scire facias* against him on the judgment, shall be tried and decided before rendering the judgment for the plaintiff.

Under our present system of practice, the plaintiff's appeal from the discharge of the trustee transferred that question only, and not the whole case, to this court. Gen. Sts. *c.* 115, § 12. The case remained in the court below. If the plaintiff intended to proceed further against the trustee, he should have had the case continued for judgment against the principal defendant. By taking final judgment and execution against him there, (as it is admitted that he did,) before the trustee had been charged by the court, he waived all further proceedings against the trustee, as much as if he had entered of record a discontinuance or a release. *Esty* v. *Flanders*, 16 N. H. 218.

In *Spring* v. *Ayer*, 23 Verm. 516, in which, after final judgment had been rendered and execution issued against the principal defendant and had been satisfied in part, the trustee was adjudged in the same suit to be chargeable for the residue, the opinion is confined to the question of issuing separate executions against the defendant and the trustee, and the difficulty of trying and deciding after final judgment in the case the question whether the trustee is or is not liable at all does not appear to have been considered. *Appeal dismissed.*

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EMILY E. FAIRBANKS *vs.* EBENEZER G. LAMSON & others.

A will directing the executor to invest the residue of the estate "as he may deem best, as a fund, the annual interest of which shall be applied for the benefit of the sabbath school library of the First Baptist Church in S., or the Baptist Home Missionary Society, whichever may be deemed most suitable," is a good charitable bequest.

BILL IN EQUITY by the granddaughter and sole heir at law of Joanna Fairbanks, of Shelburne, claiming as intestate estate the property bequeathed by the following clause in her will, of which the defendant Lamson was executor: "The rest and residue of my estate of which I shall die seised and possessed I hereby direct my said executor to invest as he may deem best, as a fund, the annual interest of which shall be applied for the benefit of the sabbath school library of the First Baptist Church in Shelburne Falls, or the Baptist Home Missionary Society, whichever may be deemed most suitable." The bill alleged that there remained in the hands of the executor as the residue of the estate of the testatrix, after paying all other legacies, the sum of fourteen hundred dollars or thereabouts, which the executor had refused upon demand to pay to the plaintiff, and the income of which he persisted, against her claim and protest, in paying for the benefit of the sabbath school library of said Baptist Church.

The defendants demurred generally to the bill for want of equity; and the case was reserved for the determination of the full court, and was argued in writing after the last term.

D. Aiken, for the defendant.

S. T. Field, for the plaintiff.

GRAY, J. Upon the case stated in the bill, both of the purposes, to either of which the testatrix authorized the residue of her estate to be appropriated, were charitable. No object is more clearly charitable, in the sense of the law, than the advancement of religion and education among an indefinite number of persons. *Jackson* v. *Phillips*, 14 Allen, 552, 553. Bequests to missionary societies, foreign or domestic, have been repeatedly upheld as public charities. *Bartlet* v. *King*, 12 Mass. 537. *Burr* v. *Smith*,

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7 Verm. 241. Boyle on Charities, 41. Bequests for the circulation and distribution of bibles and other religious books and tracts are charitable gifts. *Attorney General* v. *Stepney*, 10 Ves 22. *Winslow* v. *Cummings*, 3 Cush. 358. *Bliss* v. *American Bible Society*, 2 Allen, 334. *Pickering* v. *Shotwell*, 10 Barr, 23. So are gifts to establish and maintain a library and reading room, the use of which is not limited to the donors or subscribers. *Drury* v. *Natick*, 10 Allen, 169. The benefit of a sabbath school library in this Commonwealth is not ordinarily limited to the contributors, or to the families of those who participate in the support of the church with which it is immediately connected, but extends to the poor children of the congregation, and even of the neighborhood; and we cannot presume, in the absence of any allegation or proof, that there is anything peculiar in the management or use of the sabbath school library in question. The power of determining which of the two charitable objects mentioned by this testatrix was the most suitable, as well as the manner of investing the fund, is to be exercised by the executor. The application of the income, being limited to charitable purposes, is sufficiently defined in the will to make the bequest legal and valid. *Saltonstall* v. *Sanders*, 11 Allen, 446. *Demurrer sustained.*

HEZEKIAH ANDREWS *vs.* MICHIGAN CENTRAL RAILROAD COMPANY.

A foreign corporation can be sued in this Commonwealth only by means of an attachment of its property, unless jurisdiction otherwise is expressly given by statute.

APPEAL from a judgment of the superior court dismissing an action of contract, for want of legal service, on the motion of the defendants, who appeared specially for the purpose of objecting to the jurisdiction. The facts are stated in the opinion.

C. Allen, for the defendants, cited *Peckham* v. *North Parish in Haverhill*, 16 Pick. 286; *Danforth* v. *Penny*, 3 Met. 564; *Gold* v. *Housatonic Railroad*, 1 Gray, 424; *Blackstone Manufacturing*

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Co. v. *Blackstone*, 13 Gray, 488; *Erickson* v. *Nesmith*, 4 Allen, 233; *Smith* v. *Mutual Insurance Co.* 14 Allen, 336; Gen. Sts. *c.* 68, § 15.

W. S. B. Hopkins, (*D. Aiken* with him,) for the plaintiff.

Hoar, J. This is an action against a railroad corporation established in the state of Michigan, and the only service of the writ was upon the treasurer of the corporation at their office in Boston. There was no attachment of property. The writ alleges that the corporation has its usual place of business within the Commonwealth.

We are aware of no authority for the maintenance of such an action; and none has been found by the diligence of the learned counsel for the plaintiff. On the contrary, the numerous cases cited for the defendant fully support the opposite conclusion. A foreign corporation can only be sued in this Commonwealth by means of an attachment of its property; unless, as in the case of foreign insurance companies, by virtue of an express statute provision. The motion to dismiss was rightly allowed. *Judgment affirmed.*

James M. Crafts *vs.* Elihu Belden.

In suing the buyer of goods sold by an insolvent debtor with a view to give an unlawful preference, if the assignee in insolvency joins a count in contract for the price of the goods with a count in tort for their conversion, in the manner permitted by the Gen. Sts. *c.* 129, § 2, *cl.* 5, that is no waiver of his right to rescind the sale, when it appears that all the counts were intended to disaffirm it; although before bringing the action he made a demand for the price, and although estate of the defendant is attached on the writ.

In an action in which a count in contract is joined, under the Gen. Sts. *c.* 129, § 2, *cl.* 5, with a count in tort, it is within the discretion of the presiding judge to decide at what stage of the trial the plaintiff must elect on which count he will rely; and his decision is not a subject of exceptions.

If the purchaser of goods sold by an insolvent debtor with a view to give an unlawful preference has reasonable cause to believe that such is the intention of the seller, the sale is void, although the benefit of the preference is to enure to a creditor who by reason of his innocence of the fraud can retain the payment so made upon his debt.

Tort, with a count in contract, by the assignee of Alvin N. Claghorn, an insolvent debtor. Writ dated October 26, 1867;

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and real estate attached thereon. The declaration contained three counts, for the same cause of action; the first for the conversion of an undivided half of 24,794 lbs. of tobacco, of the property of Claghorn; the second on an account annexed for money had and received to Claghorn's use, being the price of 12,397 lbs. of tobacco at fifteen cents per pound, on February 25, 1866, with interest from that date; the third alleging that Claghorn and the defendant "were tenants in common of 24,794 lbs. of tobacco, each owning one undivided half thereof, and Claghorn was indebted to the defendant, and, being insolvent and with a view to give a preference to the defendant, bargained and sold to the defendant his undivided half of said tobacco, amounting to 12,397 lbs. at fifteen cents per pound, $1859.55, and the defendant received the same, having reasonable cause to believe said Claghorn insolvent and that such conveyance was made in fraud of the laws relating to insolvency, whereby a right of action has accrued to the plaintiff, as assignee of said Claghorn's estate, to have and recover the same with interest since February 25, 1866, the time of said sale." The answer was a general denial of all the allegations in all the counts, with a special averment that the defendant had paid Claghorn for the tobacco mentioned in the account annexed, before the beginning of the proceedings in insolvency.

At the trial in the superior court, *Devens*, J., permitted the plaintiff to introduce all his evidence indiscriminately in support of the several counts, before electing whether to proceed in tort or in contract; contrary to the objection of the defendant, who contended that the plaintiff, by declaring on a count for the price of the tobacco as sold to the defendant, had affirmed the sale, and was limited thereby to proceed in contract; and who further contended that at least the plaintiff should be directed to elect upon which counts he would proceed, before introducing his evidence. The plaintiff, after introducing his evidence, elected to proceed on the count in tort.

The evidence introduced by him included a written contract between Claghorn and the defendant, dated January 31, 1865, which was, in effect, a lease on shares of the defendant's farm

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to Claghorn for a year from April 1, 1865, afterwards extended for another year; and also two writings, called bills of sale, dated respectively November 20, 1866, and February 25, 1867, in the first of which Claghorn acknowledged the receipt from the defendant of his note for $340, payable in three months to the order of Caleb L. Thayer, and his other note for $300, payable in four months to Claghorn's order, "it being in part pay for 7500 lbs. of my half of present crop of tobacco, for which I am to be allowed fifteen cents per pound," and in the second of which he acknowledged the receipt from the defendant, in part payment "for the remaining right I have now in the 1866 crop of tobacco raised on his farm," of two of his own notes previously given to the defendant, one of them payable to the defendant's order at the Northampton Bank. It appeared that the notes for $340 and $300, which formed a part of the consideration for the sale of November 20, were given to enable Claghorn to pay a preëxisting debt due from him to Thayer, to whom they were immediately passed in satisfaction of that debt; "and there was evidence tending to show that the consideration was partly in payment of a preëxisting debt due from Claghorn to the defendant; it further appeared that the consideration of the sale of February 25 was to pay preëxisting debts due from Claghorn to the defendant; and the plaintiff contended and introduced evidence tending to show that, when these sales were made, the defendant had reasonable cause to believe that Claghorn was insolvent, and that they were made, in contravention of the insolvent laws, to prefer creditors. No question was raised or submitted to the jury as to Thayer's receiving said notes in contravention of the insolvent laws, or having reasonable cause to believe Claghorn insolvent."

"The plaintiff was duly appointed assignee of Claghorn in insolvency, April 8, 1867. Before the bringing of this action and after April 20, 1867, the plaintiff demanded of Thayer the notes given as a part of the price of the tobacco, as assets belonging to Claghorn's estate, and notified the defendant to pay the same to him. The evidence showed, and it was not disputed, that the plaintiff made a demand for the tobacco upon the defendant April 20, 1867.

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"The defendant requested the judge to instruct the jury, first, that, the plaintiff understanding all the facts at the time of bringing the action as well as he understands them at the time of the trial, the uniting of counts for the price of the tobacco in this action, and the having, previously to the bringing of the action, made a demand of the notes given for the price of Thayer, and having on the writ attached the property of the defendant to secure his demand, is an affirmation of the sale which he cannot now repudiate and resort to his counts in tort; and second, that if the sale of November 20 was made to enable Claghorn to pay to Thayer, a *bonâ fide* creditor, a preëxisting debt to the amount of $640, and the defendant made the two notes as specified in the receipt of that date, and the notes were immediately received and taken by Thayer in satisfaction of his debt against Claghorn, this action cannot be maintained to the extent of such payment.

"As to the first request, the judge declined so to rule, and instructed the jury that the plaintiff might recover in tort notwithstanding the facts set forth in said request. As to the second request, the judge instructed as requested, adding thereto 'that being the whole transaction, and nothing further being shown;' but further instructed the jury that, if a part of the object of such conveyance was to secure the debt on which the defendant was responsible at the Northampton Bank, Claghorn being then insolvent, and the defendant having reasonable cause to believe him so, then the whole conveyance would be void and the assignee might maintain his action for the full value of the property so conveyed."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

D. Aiken & W. Griswold, for the defendant.

C. Allen & A. De Wolf, for the plaintiff.

Foster, J. The fact that counts in contract and tort were united in this declaration in the manner permitted by the practice act, Gen. Sts. *c.* 129, § 2, *cl.* 5, cannot be deemed to be a waiver of the right of the plaintiff, as assignee in insolvency, to rescind the sale as fraudulent against the insolvent laws. If

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such could ever be the effect of the method of pleading adopted, which we do not intimate, it cannot be in a case like the present, where it satisfactorily appears that all the counts were intended to disaffirm and repudiate the sale. A waiver is an intentional relinquishment of a known right; and the doctrine of *Butler* v. *Hildreth*, 5 Met. 51, is simply that an assignee, who, with knowledge of the facts, has brought an action for the price of goods sold, cannot discontinue it and then sue the purchaser in trover for the value of the goods on the ground that the sale was illegal and consequently a conversion of the property. But the principle of that case has no application to the present. Nor is a mere demand of the price by the assignee an irrevocable affirmation of the sale. The counts in contract were abandoned at the trial, and it was within the discretion of the presiding judge to determine at what stage the plaintiff must elect on which counts he would rely. No exception lies to his decision on this point. *Sullivan* v. *Fitzgerald*, 12 Allen, 482.

The instructions with reference to the fraudulent character of the sale were carefully guarded, and favorable enough to the defendant. If he had reasonable cause to believe that it was the vendor's intent to contravene the insolvent laws, the sale would be void, although the benefit of the preference might enure, not to himself, but to another and wholly *bonâ fide* and innocent creditor who by reason of his innocence could retain the payment. The provisions of the statute are as broad and sweeping as possible, and are levelled against the most indirect and circuitous preferences. Gen. Sts. *c.* 118, §§ 89, 91. If any part of the purpose of the sale or conveyance was fraudulent, the whole was void. *Exceptions overruled.*

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Franklin Howes *vs.* Inhabitants of Ashfield.

At a trial to assess damages for an injury sustained by a laborer through a defect in a highway, increased damages were not claimed on account of others dependent on the plaintiff for support; and there was no evidence that any one was so dependent; nor any evidence of what family he had, except such as was introduced incidentally and without objection. *Held*, that, under these circumstances, there was no ground of exception to the addition by the judge to an instruction to the jury "that the plaintiff was entitled to recover damages for the diminution of his ability to labor," of the words "for his own support and the support of those dependent on him."

Tort for an injury sustained by the fall of a bridge in a highway in Ashfield on August 20, 1867. At the trial in the superior court, before *Devens*, J., the only question submitted to the jury was of damages, which they assessed in the sum of $4183.33; and the defendant alleged exceptions of which the following was the material part:

"The evidence tended to show that before the injury complained of the plaintiff was a healthy, robust and laborious man, fifty-two years of age: that he had a wife and a family of children, some of whom were minors, living with him in the defendant town; that he had been by occupation at different periods of his life a farmer, a tanner, and a peddler; that by the fall of the bridge he received a severe concussion of the spine by a blow upon the back of his neck and left shoulder, whereby he had since been disabled from performing any labor; that his spinal disease had not been alleviated by any medical treatment to which he had submitted, but had continued to grow worse, so that at the present time there was not more than an even chance that he would ever be restored or be any better.

"The judge instructed the jury, among other things not objected to, that the plaintiff was entitled to recover damages for the diminution of his ability to labor for his own support and the support of others dependent upon him; to which ruling and instruction the defendants except."

These exceptions the judge allowed, with additions in substance as follows: "There was no evidence that any one was dependent on the plaintiff for support, and no evidence of what

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family he had, except such as came in casually and incidentally on one side and the other without objection. The plaintiff's deposition was taken and read in evidence, in a direct interrogatory in which he was asked what family he had in August 1867, with the names, ages and residence of his children; which interrogatory with the answer thereto were on the defendants' objection excluded. No point was made on either side, nor any allusion, in regard to the plaintiff's family as affecting the amount of damages.

"Before the charge to the jury, the defendants presented numerous written requests for instructions upon the rule of damages applicable to the case. The judge stated in substance what instructions he should give, among other things stating that he should instruct the jury that they should give damages for the diminution of the plaintiff's capacity to labor; and these instructions were assented to by both parties. The judge further requested the counsel on both sides that if, after hearing the charge, the instructions did not meet their views of the law, they should call his attention thereto at the close of the charge. The defendants' counsel accordingly, at the conclusion thereof, called his attention to one particular, in respect to which they requested different or more full instructions. These were in reference to the plaintiff's alleged negligence after the injury to take suitable care of himself. The instructions thus requested were given. No suggestion in regard to the matter now presented in the bill of exceptions was made by the defendants' counsel; and they were not understood at the time by the presiding judge to raise any exceptions to the instructions as finally given to the jury."

D. Aiken, for the defendants.

C. Allen & S. O. Lamb, for the plaintiff, were not called upon.

Wells, J. The instruction "that the plaintiff was entitled to recover damages for the diminution of his ability to labor" was correct. If it had been that and nothing more, the defendants do not contend that it would have been wrong. In the opinion of the court, the addition of the words "for his own support and the support of those dependent upon him" did not

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enlarge the ground of damages; nor imply that the jury were authorized to consider, as a special ground of damage, the loss of such support by those who might be dependent upon the plaintiff. It was a redundancy of expression, which might furnish a reason for setting aside the verdict, if it should appear that the language was likely to mislead the jury. But, from the statement of the judge which accompanies these exceptions, it is manifest that it could have no such tendency. Increased damages were not claimed, at the trial, on account of others dependent upon the plaintiff. We cannot suppose, therefore, that this expression of the judge was applied by the jury in a wrong sense. *Exceptions overruled.*

COMMONWEALTH *vs.* FRANCIS H. MORRELL & another.

To identify the tag of a valise, oral evidence of words written on it is admissible, without producing the tag itself or proving its loss.

The decision of the presiding judge at a trial, upon the credibility of evidence of the loss of a written instrument, offered on a hearing preliminary to the introduction of secondary evidence of its contents, is conclusive, and not subject to exceptions.

On a preliminary hearing, by the judge presiding at a criminal trial, of the circumstances under which confessions of the defendant, offered in evidence, were obtained, his direction to the prosecuting officer to conduct the examination of the witnesses, and refusal to permit the defendant's counsel to cross-examine them, afford no ground of exception.

INDICTMENT for robbery. At the trial in the superior court, before *Devens*, J., the defendants were found guilty, and alleged exceptions which were allowed as follows:

"The evidence for the Commonwealth tended to show that Thomas Wait of Greenfield was robbed on the night of February 19, 1868, at Greenfield. There was further evidence tending to show that Anthony Baker, one of the defendants, the day after the robbery shipped by express from South Deerfield two valises for Chicago, Illinois. The express agent at South Deerfield testified that he affixed tags to the valises, which he marked, by direction of Baker, 'B. Anthony, Chicago, Ill.,' which name Baker gave as his own. Afterwards James P. Wade, a

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detective officer, testified that he and one Jones, his partner, arrested the defendants at Chicago, took possession of their baggage, and detached the tags from their valises for the purpose of preserving them as evidence. The witness was proceeding to state what was written on the tags so detached by him, when the defendants' counsel objected, claiming that the tags must be produced or shown to be lost before the writing thereon could be given by the witness. The witness then testified that he had kept the tags, taken them to Boston, and given them to Jones, and that they had been placed by Jones in a drawer in the office jointly occupied by Jones and the witness, to which drawer they both had access and keys, and of which both had equal control; that Jones and himself had together looked for said tags; and that they could (did?) not find them, and he believed them to be lost. Jones was not called as a witness. On this testimony, and against the defendants' objection, the presiding judge ruled that the witness might state what was written on the tags; and the witness stated that on the tags was written 'B. Anthony, Chicago, Ill.'

"The prosecuting officer introduced Wade and several other witnesses to testify to conversations with the defendants, with a view to show admissions and confessions by them. In case of each of these witnesses the defendants' counsel requested that a preliminary examination be instituted by the court as to the circumstances under which the admissions or confessions were obtained. These examinations being in each case instituted, the defendants' counsel claimed the right to cross-examine the various witnesses on the preliminary issue. The presiding judge ruled that as matter of law no such cross-examinations could be allowed; and the witnesses, after being examined by the prosecuting officer under the direction of the court to ascertain whether any promises or threats were made, or other improper inducements offered, to draw forth confessions from the defendants, were permitted to state their conversations with the prisoners, containing admissions and confessions, under objections by the defendants."

W. S. B. Hopkins, (*D. Aiken* with him,) for the defendants.

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C. Allen, Attorney General, for the Commonwealth.

CHAPMAN, C. J. The law generally requires the production of the highest evidence of which a thing is capable; and evidence is to be excluded which supposes still higher evidence behind in the possession or power of the party. But the rule is far from being universal. For example, it does not require that a supposed writer shall be called to prove his own handwriting, or that a person whose identity is to be proved shall be produced in court. The same is true in respect to an animal or any other object the identity of which is to be proved.

The general rule is most frequently applied to writings, where proof is offered of their contents. The writing itself must be produced. But there are many exceptions as to writings. An inscription on a banner or flag carried about by the leaders of a riot may be proved orally. *The King* v. *Hunt*, 3 B. & Ald. 566. Or a direction contained on a parcel. *Burrell* v. *North*, 2 Car. & Kirw. 679. Or a notice to an indorser of a promissory note. *Eagle Bank* v. *Chapin*, 3 Pick. 180.

In the present case, the tag referred to was not a document, but an object to be identified. The words written upon it served to identify it; and the court are of opinion that oral evidence was admissible for this purpose, and that it was not necessary to produce the tag. An inspection of the tag with the written direction upon it might have been more satisfactory to the jury than an oral description of it, and therefore might be regarded as the stronger evidence; but the strength of evidence and the admissibility of evidence are different matters.

But even if it ought to have been produced in the absence of evidence of its loss, the proof of loss was adduced to the judge, and his decision as to the credibility of the evidence of loss was conclusive, and not subject to exception. *Foster* v. *Mackay*, 7 Met. 531.

The other exception relates to the confessions of the defendants. Their counsel requested that a preliminary examination be instituted by the court as to the circumstances under which the confessions were obtained. The purpose of such an examination is to satisfy the judge whether the evidence is admis-

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sible. Upon the request being made, it was for him to direct the course of the examination; and he might, if he thought proper, direct the prosecuting officer to conduct it. The defendants' counsel had no legal right to conduct it contrary to the direction of the judge; and the extent to which it should be carried, and its effect upon the admissibility of the confessions, were to be decided by the judge. It is not alleged that the right of cross-examination was abridged when the evidence was offered to the jury. The court can see nothing in the proceedings that is subject to exception. *Exceptions overruled.*

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF HAMPDEN, SEPTEMBER TERM 1868, AT SPRINGFIELD.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. EBENEZER R. HOAR,
HON. HORACE GRAY, JR.,
HON. DWIGHT FOSTER,
HON. JOHN WELLS,
} JUSTICES.

RICHARD DELANEY *vs.* CORYDON ROOT.

By an oral contract between A. and B. for the cultivation of B.'s land, each was to furnish one half of the seed and manure, B. to do the team work, and A. the hand work and harvesting of the crop, which they were to divide equally. Each furnished his share of material, and did his share of the work, until after the crop began to grow, when B. refused to do more work, and forbade A. to go again upon the land. A. nevertheless entered the land again at harvest time, and cut the crop, when B. seized and consumed the whole of it against A.'s will, no division of it having been made, nor any demanded by either of them. *Held*, that they were tenants in common of the crop, and B. was liable in tort for his conversion of A.'s share of it.

TORT in the nature of trover for the conversion of an undivided half of a crop of corn. Trial in the superior court, before *Lord*, J., who allowed the following bill of exceptions:

"The plaintiff, in opening his case, stated that he expected to prove the following facts: That in the spring of 1866 he entered into a contract orally with the defendant, to farm a lot of land

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belonging to the defendant, upon shares; that it was agreed that each should furnish one half of the seed and manure, that the plaintiff should do the hand labor and the defendant the team work, that the plaintiff should harvest the crops, and that they should be divided equally between them; that the plaintiff went upon the land, and (after the defendant had ploughed the same) planted the same to corn, furnishing his half of the seed and manure; that thereafter, when the crop needed hoeing, he called on the defendant to furnish a team, to wit, a horse and a cultivator, to cultivate the same, which he refused, and then the plaintiff hoed the same as well as he could without its being cultivated; that thereafter, at the proper time, he undertook to hoe the crop a second time, and was forbidden to go upon the land by the defendant, and thereupon desisted; that at harvest time the plaintiff went upon the land, against the defendant's wishes and without his leave, and cut the corn and put it in stacks, and, in the night time after the day of so doing, the defendant carried the same away without the plaintiff's knowledge or consent, (neither party having made or demanded a division of the same,) and took the whole crop and fed it out to the cattle of the defendant, against the plaintiff's will. The plaintiff stated he did not expect to prove that the plaintiff demanded any division of the crop previous to the carrying of the same away, as above stated by the defendant. Upon this statement the court ruled that the plaintiff could not maintain his action, and ordered a verdict for the defendant; and the plaintiff excepts."

G. M. Stearns, for the plaintiff.

C. A. Winchester, for the defendant.

Hoar, J. It is settled in this Commonwealth that one tenant in common of a chattel may maintain an action of trover, or tort in the nature of trover, against his cotenant, who has converted the chattel to his own use; and that such a conversion may be proved by the destruction of the chattel; by its sale; or by such an act of appropriation as will, by its nature, finally preclude the other party from any future enjoyment of it. 2 Greenl. Ev. § 646, note 4. *Daniels* v. *Daniels*, 7 Mass. 135.

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Weld v. *Oliver*, 21 Pick. 559. *Burbank* v. *Crooker*, 7 Gray, 158. If the plaintiff, therefore, was tenant in common with the defendant of the corn which the defendant took and consumed, the action may be maintained.

The defendant contends that, by the contract on which the plaintiff relies, no title or interest in the land was created, but merely a revocable license to enter for the purpose of planting and cultivating the crop; and that this license was revoked. And the authorities are abundant to sustain the doctrine that a mere license to enter upon land is revocable, so far as it remains executory. *Drake* v. *Wells*, 11 Allen, 141, and cases there cited. A contract for the sale of growing trees, or growing annual crops, to be severed from the land by the purchaser, does not convey any interest in the land; and, so far as it implies a license to enter upon the land, the license may be revoked before it is executed. *Parsons* v. *Smith*, 5 Allen, 578. *Giles* v. *Simonds*, 15 Gray, 441.

But the application of this doctrine to the case of a contract for cultivating land on shares is attended with some difficulties; and it is not easy to define with precision the nature of the title or interest created by the contract, either as between the contracting parties themselves, or in regard to third persons. There may be an interest in land of a qualified nature, where the land itself is not conveyed. Thus if one grant to another *vesturam* or *herbagium terræ*, the land does not pass; but the grantee may have an action of trespass *quare clausum* for a disturbance of his right. Co. Lit. 4 *b*. And, where one had the exclusive right of cutting turf in a several parcel of land, it was held that he might maintain trespass against one who dug and carried away turf from that place. *Wilson* v. *Mackreth*, 3 Burr. 1824. In *Clap* v. *Draper*, 4 Mass. 266, it was held that under a grant of all the trees and timber standing and growing on a close, with liberty at all times to cut and carry away the trees, the grantee might maintain trespass *quare clausum fregit* against the owner of the soil for cutting down the trees. In these cases the right in the land, though limited, was exclusive.

When land was farmed on shares, it was held in *Hare* v.

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Celey, Cro. Eliz. 143, that the owner of the soil only could bring trespass for breaking the close; but that the tenants on shares might join with him in an action of trespass for spoiling the corn, because they were tenants in common of the crop. And like decisions have been made in several cases in New York. *Foote* v. *Colvin*, 3 Johns. 216. *Bradish* v. *Schenck*, 8 Johns. 151. *Stewart* v. *Doughty*, 9 Johns. 108. *De Mott* v. *Hagerman*, 8 Cowen, 220. *Caswell* v. *Districh*, 15 Wend. 379. Contracts of this nature may either be regarded as a lease of the land, with a rent payable in a portion of the crop; or as an agreement by one man to work upon the land of another, and to receive a part of the crop as compensation for his labor; or as giving the laborer a qualified interest in the land, not exclusive, and not such as makes him a tenant, but creating a tenancy in common of the growing crops with the owner of the soil, and giving him a right of ingress and regress for the purpose of cultivating them and taking away his share. When the terms of the contract will admit of the latter construction, it is preferred, as giving greater security to the rights of both parties.

The two cases in which the subject has been considered in this Commonwealth are *Chandler* v. *Thurston*, 10 Pick. 205, and *Walker* v. *Fitts*, 24 Pick. 191. In *Chandler* v. *Thurston*, the contract was by parol, and was to take the land to cultivate, find half the seed, and when the crop was harvested to have half as a compensation for the labor. Bragg, who had contracted to cultivate the farm on these terms, had absconded before completing his agreement; and it was held that he had no right in the crop when harvested, because, if his contract were only regarded as a contract to labor on the land, and receive his pay in produce, he had not performed it; and if it was regarded as a hiring of the land, rendering a rent in produce, he was only a tenant at will, and, having terminated the estate at will by his own act, was not entitled to emblements. In *Walker* v. *Fitts*, the contract was very much like that in the case at bar, but by an agreement under seal; and it is said by Mr. Justice Morton, that, "whatever may be the nature and extent of the interest of the occupant, in the land, and whether he has any possession

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for the interruption of which he can have any legal remedy or not, it is in our opinion well settled that of the growing crops he is tenant in common with the owner."

And we are all of opinion that in this case the facts which the plaintiff offered to prove were sufficient to maintain the action, and that the exceptions must be sustained. It makes no difference that the contract was by parol, because he had been put into such possession of the land as his qualified interest required. Although by our statute this interest, being created by parol, could not exceed a tenancy at will, yet, when the owner of the land undertook to terminate it, the right to emblements remained. The parties were tenants in common of the crop, and the defendant was responsible in tort for the conversion of the plaintiff's share. *Exceptions sustained.*

CHARLES SCOTT & others *vs.* JULIA A. HAWKINS & trustees.

The maker of a promissory note payable on demand, and due and unpaid at the time of the service of the writ on him, is chargeable in foreign attachment as trustee of the payee, in the absence of proof of the transfer or indorsement of the note.

A person cannot be admitted for the first time, in this court, as claimant of funds in the hands of the trustee in an action of foreign attachment in the superior court, in which the question of charging the trustee on his answer is pending in this court on appeal.

HOAR, J. The two parties summoned as trustees in this action had each given to the principal defendant a promissory note, payable to her or her order on demand, which were due and unpaid at the time of the service of the writ upon them. The only statement in the answers which could distinguish their liability as trustees is, that one says that she does not know where the note is, and the other says that she does not know where it is, or where it was at the time of service; but we do not see that this distinction is of any consequence.

The single question is, whether the maker of a negotiable promissory note, payable on demand and unpaid, is chargeable as the trustee of the payee, there being no proof of its transfer

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or indorsement. And we can have no doubt that by the provisions of Gen. Sts. *c.* 142, and *c.* 53, § 10, he is to be charged. It is an acknowledgment of money due from the maker to the payee, and so comes within the terms of *c.* 142, § 24. It is not a negotiable security "payable on time and not overdue," and is not therefore within the exception in § 31. Charging the trustee, and a payment by him in consequence, will be a complete defence to the claim of an indorsee, who has not previously given notice to the promisor of the indorsement or transfer. *c.* 53, § 10. The trustees are therefore chargeable upon their answers.

The motion by a party who alleges that one of the notes was indorsed to him before the service of the writ upon the trustee, and who asks to be admitted as a claimant, must be made and heard in the superior court, from which the question upon the trustee's answers, and not the case, has been transferred to this court. *Knights* v. *Paul*, 11 Gray, 225.

Trustees to be charged upon their answers.

H. B. Stevens, for the plaintiffs.

N. T. Leonard, (*M. B. Whitney* with him,) for the trustees.

TERENCE O'DONNELL *vs.* ANN MCINTIRE & trustees.

Trustees in foreign attachment who are charged on their answers in a justice's court are not entitled to costs for travel and term fees in the superior court on the appeal of either the plaintiff or the defendant from the judgment of the justice on the main issue in the action.

APPEAL by thirteen trustees in an action of foreign attachment, commenced before a justice of the peace, from the disallowance by the superior court of their claim for costs for travel and term fees after the plaintiff's appeal from the judgment of the justice's court, where they were charged on their answers. The facts appear in the opinion.

E. W. Chapin, for the plaintiff.

G. M. Stearns & M. P. Knowlton, for the trustees.

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WELLS, J. The trustees in this case were charged upon their answers in the justice's court. The plaintiff, having recovered judgment for a sum much less than the amount of his demand, appealed to the superior court, and there recovered judgment for a larger sum. The trustees now claim to be allowed costs for travel and attendance during the whole pendency of the suit between the principal parties. No further examination of the trustees was had, and there was no occasion for them to appear at all in the superior court. It is true that, although charged upon their answers, their liability was not fixed until the final judgment. It must await, and was contingent upon the result between the principal parties. But that contingency only affects the mode in which and person to whom they shall pay their admitted indebtedness, and the mode in which and person or fund from which they shall receive the costs to which they are entitled alike in either event. They have no legal interest in the controversy between the plaintiff and defendant; and no rights to be protected by their further attendance upon the suit. The litigation is terminated, as to them, by the interlocutory judgment charging them upon their answers.

This case is covered by the recent decision in *Kellogg* v. *Waite*, *ante*, 501, in which the grounds are more fully discussed and authorities cited. The appeal therefore cannot be sustained. *Judgment of the superior court affirmed.*

JAMES W. SMITH *vs.* DANIEL B. HOLCOMB.

The submission of a cause of action to four arbitrators by whose "final award" the parties promised to abide; their award "that we come to the final conclusion that in the amount of damages we do not agree, but our agreement is that each party pay his own arbitrators" a certain sum each; and the payment of one of the arbitrators by the plaintiff; are no bar to another action by the same plaintiff against the same defendant on the same cause.

In assessing damages for an assault and battery, the jury may consider as an aggravation of the tort the mental suffering of the plaintiff from the insult and indignity of the defendant's blows.

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Smith v. Holcomb.

On a trial, after the case had been committed to the jury and they had retired, the sheriff, by order of the judge on the plaintiff's motion, delivered to them a motion for an increase of the allegation of damages in the writ, which had been granted before the trial and the plaintiff had stated to them in his opening, and which they had accidentally omitted to take with them in retiring. *Held*, that the defendant had no ground of exception.

Tort for assault and battery by blows on the plaintiff's head. Writ dated February 23, 1867. Answer, among other things, that on November 19, 1866, the plaintiff sued the defendant for the same cause of action, and on February 6, 1867, by a writing under seal, the parties withdrew that action from court, and submitted it "for final decision" to a board of four arbitrators, (three of the four, including one physician, being named in the writing, and it being provided that the fourth also should be a physician, to be selected by the defendant,) who were to meet on February 16, at the plaintiff's house in Chester, "to hear the parties by their own statements, without counsel or other evidence in the hearing," and by whose "final award" the parties mutually promised to abide; that the arbitrators met at the appointed time and place, "and the plaintiff and the defendant were both present, and were heard by the arbitrators fully and according to the terms of their agreement, and the arbitrators thereupon made up their award," and indorsed it upon the written agreement, as follows: "The undersigned, arbitrators within named, have heard the parties by their several statements under oath, other evidence by the board being excluded; and, there being a wide divergence in their statements aforesaid, we come to the final conclusion that in the amount of damages we do not agree on any sum; but our agreement is, that each party pay his own arbitrators the sum of five dollars each."

Damages were laid in the writ in the sum of $500, and afterwards increased to $3000 on the written motion of the plaintiff.

At the trial in the superior court, before *Devens*, J., the plaintiff's counsel in his opening stated to the jury the increase of the *ad damnum;* and evidence was offered in the plaintiff's behalf, that the defendant struck him unlawfully. The defendant offered in evidence the original submission and award as set forth in the answer. "It was admitted that the cause of action

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declared on was the same as that submitted under said submission. It also appeared that the plaintiff, after said award was published, paid to one of the referees chosen by him three dollars for his fees as referee, being all that said referee charged him; and that the plaintiff had not settled with the other referee chosen by him. The court excluded the evidence of the submission and award, and ruled that the same were no defence to this action. The court instructed the jury that the plaintiff, if entitled to recover at all, could recover for all the direct injurious results to him by reason of this assault, and could also recover for the insult and indignity inflicted upon him by reason of the blows given him by the defendant. The defendant excepted to so much of the instructions as related to the insult and indignity. After the jury had retired and been out some length of time, the plaintiff's counsel requested that the motion to increase the *ad damnum* might be sent to the jury. The defendant objected, but the court, being satisfied that the paper had been accidentally omitted to be sent out, ordered the sheriff to deliver the same to the jury, and the sheriff did so deliver it." The jury found for the plaintiff, and assessed damages in the sum of $200. The defendant alleged exceptions.

A. M. Copeland, for the defendant.

H. Morris & E. H. Lathrop, for the plaintiff.

CHAPMAN, C. J. The language of the award does not import that the arbitrators have come to any conclusion in respect to damages; but that they are unable to do so by reason of disagreement among themselves. They are only able to agree that each party pay "his own arbitrators" the sum stated for their services. It is quite unlike the award in *Stickles* v. *Arnold*, 1 Gray, 418, and the awards in the other cases there referred to. The arbitrators have not decided the principal matter which was submitted to them, and such an award is no bar to this action. *Houston* v. *Pollard*, 9 Met. 164. *Fletcher* v. *Webster*, 5 Allen, 566. *Estes* v. *Mansfield*, 6 Allen, 69.

The insult and indignity inflicted upon a person by giving him a blow with anger, rudeness or insolence, occasion mental suffering. In many cases they constitute the principal element

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of damage. They ought to be regarded as an aggravation of the tort, on the same ground that insult and indignity, offered by the plaintiff to the defendant, which provoked the assault, may be given in evidence in mitigation of the damage. Even where there is no insult or indignity, mental suffering may be a ground of damage, in an action of tort for an injury to the person. *Canning* v. *Williamstown*, 1 Cush. 451.

The amendment to the writ ought to have been delivered to the jury with the writ; and, if it was left behind by mistake, it was proper to send it to them. It was not like sending them a letter, as in *Sargent* v. *Roberts*, 1 Pick. 337; or a paper which they ought not to have, as in *Whitney* v. *Whitman*, 5 Mass. 405, and *Alger* v. *Thompson*, 1 Allen, 453. It happens not unfrequently that some paper belonging to the case is accidentally left behind when the jury retire, and to send it to them without remark cannot be regarded as a communication which must be made in the court room. *Exceptions overruled.*

ELI MAYNARD *vs.* WILLIAM PEASE & others.

A factor received tobacco for sale, and agreed not to sell it for less than forty cents per pound, and to hold it subject to his principal's orders until sold at that price. He did not sell it at that price, nor obey the orders of his principal in relation to it, and refused to return it on demand. At the time of the demand it was worth forty cents per pound. In an action by the principal against the factor on the agreement, the defendant requested a ruling that, if he sold any of the tobacco for less than forty cents per pound, he was liable only for its fair market value at the time of sale. This the judge refused; and ruled, in substance, that the plaintiff might recover, for the loss sustained by the failure to obey his orders, not exceeding forty cents per pound, or the market value of the tobacco at the time when the return was demanded; and that the increase of market value up to forty cents per pound before the demand for a return was an item of damage. *Held*, that the defendant had no ground of exception.

FOSTER, J. This is a bill of exceptions, and is expressly stated not to be a report of all the evidence. The plaintiff has been permitted to obtain a verdict on the last count in his amended declaration, which alleges that the defendants as factors received his tobacco, and agreed that they would not sell it

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at less than forty cents by the pound and would hold it subject to the plaintiff's order until they should sell it at that price; but that they did not sell it at that price, nor hold it subject to his order, nor obey his orders in relation thereto; and that he ordered them to forward it to him at Boston, which they refused to do; and that it was worth forty cents the pound at the time when they so refused; and that they have ever since refused to forward it or deliver it to him, and he has wholly lost it. The verdict of the jury establishes these allegations.

The only instructions open for revision relate to the measure of damages. The presiding judge was requested to rule that, if any tobacco was sold for less than forty cents the pound after that limit was imposed, the defendant would be responsible in damages only to the extent of the fair market value at the time it was sold. This he declined to do, except with modifications; and the rule of damages which he stated was, in substance, that the plaintiff might recover for the loss sustained by failure to obey his orders, not exceeding forty cents the pound or the market value at the time when the return of the tobacco was demanded; but that the increase of market value up to forty cents the pound before the demand for a return was an item of damage. We perceive nothing in this rule of which the defendants can justly complain. The sale of the tobacco below the limit of their authority was a breach of their agreement, and they cannot restrict the damages to the market value at that precise point of time. The injury may have consisted not in selling below the existing market price, but in choosing a time for sale when the market was depressed and a favorable price could not be realized. The consignor had a right to insist that the goods should be held until his price could be obtained.

We do not find it necessary to decide what rule of damages is absolutely correct. It has sometimes been said that the highest market price before action brought is the standard; at others that the highest value before the trial may be awarded. It is safe to say that the factor is at least liable for the highest market value of the goods within a reasonable time after a sale in violation of instructions. And in the present case there can be no

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doubt that the time when the plaintiff demanded the return of the goods was soon enough after the defendants' disobedience of instructions to make the highest market price previous to that date a limit sufficiently favorable to the defendants.

Exceptions overruled.

H. Morris, for the defendants.

G. M. Stearns & M. P. Knowlton, for the plaintiff.

ELIHU R. HAWKS *vs.* WILLIAM H. TRUESDELL.

Special findings of the jury in an action at law, not confirmed by a judgment of the court nor essential to or involved in the general verdict, are not conclusive of the facts found, on either party, in another trial of the same cause.

On the trial of an action upon a promissory note there were special findings in favor of the defendant as to the consideration of the note, but the judge directed a general verdict for the plaintiff on grounds to which the defendant alleged exceptions, which were sustained. At the new trial, the plaintiff conceded that those findings negatived the only consideration for the note on which he relied, whereupon the judge ruled that he was estopped from offering evidence of such consideration, and directed a verdict for the defendant. *Held*, that this ruling was erroneous.

CONTRACT on a promissory note. At the second trial in the superior court, after the decision reported 12 Allen, 564, *Brigham*, J., directed a verdict for the defendant, and the plaintiff alleged exceptions. The case is stated in the opinion.

G. M. Stearns, for the plaintiff.

J. G. Allen, for the defendant, cited *French* v. *Hanchett*, 12 Pick. 15; *Sutton* v. *Dana*, 1 Met. 383; *Shapleigh* v. *Wentworth*, 13 Met. 358; *Stiles* v. *Granville*, 6 Cush. 462; *Lawler* v. *Earle*, 5 Allen, 22; *Hamilton Woollen Co.* v. *Goodrich*, 6 Allen, 201; *Jones* v. *Fales*, 5 Mass. 101; *Train* v. *Collins*, 2 Pick. 145; *Glover* v. *Holbrook*, 5 Allen, 155; Gen. Sts. *c.* 112, § 15; *c.* 114, § 12; *c.* 115, § 9; *Davis* v. *Maxwell*, 12 Met. 286; *Lowell Gas Light Co.* v. *Bean*, 1 Allen, 274; *Phillips* v. *Soule*, 6 Allen, 152.

WELLS, J. At the first trial of this case in the superior court there were two special findings by the jury, favorable to the defendant, touching the consideration of the note in suit; but, under the instructions of the court, a general verdict was re-

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turned for the plaintiff. The defendant took exceptions to these instructions, and his exceptions were sustained by this court. Upon a new trial in the superior court the defendant moved that a formal verdict might be ordered by that court and a judgment rendered thereon in his favor; claiming that, under the decision of this court, the special findings at the former trial were conclusive of his right thereto. The plaintiff conceded that the only consideration relied upon by him was one which had been negatived by the previous special findings. Thereupon the judge ruled that the plaintiff was precluded from showing such consideration, and directed a verdict and judgment for the defendant.

The question, therefore, which the case presents is this: In a suit at law, can special findings of a jury, not confirmed by any judgment of the court, nor involved in any general verdict, be relied on, in a trial before another jury in the same or another suit, as proof of the facts thus found? We think it clear, both upon principle and authority, that they cannot. It is the verdict, with the judgment of the court upon it, which constitutes the estoppel, or the *res adjudicata*. That may furnish conclusive proof of all essential facts involved in it. Special findings may be resorted to to ascertain upon what facts the verdict and judgment were rendered. But facts so found are not conclusively established between the parties unless they are also essential to or shown to be involved in the verdict and judgment. *Gilbert* v. *Thompson*, 9 Cush. 348. *Burlen* v. *Shannon*, *ante*, 200.

When facts specially found by the jury are necessarily decisive of the case, a general verdict, in accordance therewith, will be sustained, notwithstanding that exceptions are well taken upon other points, or that other controverted facts are not found in favor of the same party. Even where the verdict is to be set aside, the court may undoubtedly regard such special findings in determining whether the circumstances require that the whole case be opened for a new trial, or only that part of the case in respect of which there has been error at the previous trial. The cases cited by the defendant go no further than this. No decision is cited, and we think none can be found to sustain

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the position of the defendant in the present case. The exceptions were sustained by this court without any limit upon or direction in regard to the new trial which would necessarily follow. The error at the first trial was not limited to any subordinate point, but affected the entire verdict. That verdict having been vacated, the special findings upon subordinate questions furnish no basis upon which another jury can render an opposite verdict, or any verdict whatever. They have not the force of adjudications by which either party can be concluded. If, upon the new trial, the plaintiff attempts to maintain positions and establish proofs contrary to the positions and proofs which he sought to maintain and establish at the former trial, that may be urged against him and considered by the jury as matter *in pais*. But it will be for the jury and not for the court to determine how much weight shall be given to such circumstances. As the court below ruled that the plaintiff was precluded from proving any facts inconsistent with the special findings at the former trial, the verdict for the defendant was improperly directed, and the

Exceptions must be sustained.

JOHN W. LABAREE & others *vs.* SARAH A. COLBY.

Evidence that a married woman, at the time of buying articles of apparel for her own wear, told the seller to charge them to her and promised to pay for them out of her separate estate, is sufficient to sustain an action by him against her personally, under the Gen. Sts. c. 108, §§ 1, 3, for the price of the goods.

CONTRACT on an account annexed for goods sold to the defendant. Answer, that at the time of the sale she was a married woman living with her husband and not engaged in any separate business.

At the trial in the superior court, before *Lord*, J., it appeared that the goods were articles of apparel for the defendant's own wear; and that at the time of buying them she directed the plaintiffs to charge them to her, and represented that she owned separate estate, inherited from her father, out of which she would

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pay for them. The judge ruled that this evidence would not support the action, and directed a verdict for the defendant. The plaintiffs alleged exceptions.

J. M. Stebbins, for the plaintiffs.

G. M. Stearns & M. P. Knowlton, for the defendant.

Gray, J. By the Gen. Sts. *c.* 108, § 1, the property, both real and personal, which comes to any married woman by gift or grant, remains her separate property; and by § 3 she may bargain, sell and convey her separate real and personal property, enter into any contracts in reference to the same, and sue and be sued in all matters having relation thereto, in the same manner as if she were sole. It was decided in *Stewart* v. *Jenkins*, 6 Allen, 300, that a contract by which a married woman acquired separate property was a contract in reference to her separate property within the meaning of the statute, and that a promissory note given by her in payment for a homestead conveyed to her sole and separate use might therefore be enforced against her; and in *Spaulding* v. *Day*, 10 Allen, 96, that a note given by her for wood sold to her on her own credit, and delivered at a house owned by her and in which she lived with her husband, was equally binding upon her; although there was no evidence in either case that she carried on any separate trade or business. Those cases are decisive of this; for a married woman may as well buy necessary wearing apparel to be worn by her, as purchase a homestead, or wood to be used on a homestead already belonging to her and occupied by her husband and herself jointly; and the testimony given at the trial, that the defendant directed the plaintiff to charge the articles sued for to her and promised to pay for them out of her separate estate, was sufficient evidence that these articles, intended for her own wear, were purchased on her own credit, and not on that of her husband.

Exceptions sustained.

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JOB L. WORTHY *vs.* ELIAKIM W. CLAPP & another.

A promissory note, made to a wife in consideration of the sale by her husband of his interest in a partnership of which she furnished the pecuniary capital, is her separate property, and not attachable by trustee process against her husband, in the absence of fraud.

TRUSTEE PROCESS, dated November 12, 1866. Charles W. Grant and Francis G. Strickland, copartners under the firm of Grant & Strickland, were summoned as trustees of the defendants Clapp and John N. Howard, copartners under the firm of Clapp & Co., and filed an answer in the superior court, of which the following is the material part:

"The said trustees say that on or about November 1, 1866, they bought of Eliakim W. Clapp, who they believed at the time was or had been a partner with Howard under the name and firm of Clapp & Co., all the interest of said Eliakim and said firm in the partnership effects of said firm of Clapp & Co., and all said Eliakim's interest in the same, and, as payment for the goods and chattels thus purchased of said Clapp & Co. and said Eliakim, they gave their negotiable promisssory note for the sum of $430, payable to Mrs. Patience Clapp, wife of said Eliakim, or order, and payable, as they believe, on demand; that their said note to Mrs. Clapp was made payable to her upon the statement of said Eliakim, made at the time they gave the note, that all the money which had been put into said firm, or used therein, was his wife's money, furnished by her, and that she must have her rights protected, which said statement said trustees believed and now believe to have been the fact, and made their note payable to her as aforesaid. They deny that they had any goods, effects and credits of said defendants in their hands or possession at the time of said service on them, unless as above stated."

On this answer judgment was ordered charging the trustees; and they appealed.

H. B. Stevens, for the plaintiff.

N. T. Leonard, for the trustees.

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GRAY, J. The promissory note made to Mrs. Clapp, by a partnership of which her husband was not a member, in consideration of a sale by him of the interests of himself and his firm in another partnership, the pecuniary capital of which is to be taken upon the answers of the trustees to have been furnished by her, was, under the existing statutes of the Commonwealth, her separate property, and, in the absence of fraud, could not be attached, by trustee process or otherwise, against her husband. Gen. Sts. c. 108, § 1. *Chapman* v. *Williams*, 13 Gray, 416. *Lord* v. *Davison*, 3 Allen, 131. *Ames* v. *Foster*, Ib. 541.

Trustees discharged.

JOSIAH S. KNOWLES *vs.* MARIA L. HULL.
LEMUEL B. BLOOD & another *vs.* SAME.

A husband, having taken a lease of a shop from the owners with an understanding that he should underlet it to his wife for her separate business, admitted her to the occupation of it and took rent from her as his tenant; and she continued such occupation for her separate business after the determination of his lease by a sale of the premises. *Held*, that he, and not she, was liable to the grantee of his lessors, under the Gen. Sts. c. 90, § 25, for such continued use and occupation as a tenant at sufferance.

TWO ACTIONS, commenced October 2, 1867, under the Gen. Sts. c. 90, § 25, (by which tenants at sufferance are made liable to pay rent during the time of their occupation,) for the use and occupation of a shop in Westfield; the first, from April 3, 1866, to January 1, 1867; the second, from January 8, 1867, to October 1, 1867; tried together in the superior court, before *Lord*, J., without a jury, and reported by him, for the determination of this court, in substance as follows:

On April 1, 1863, the Central Baptist Society in Westfield leased to John S. Hull, the defendant's husband, the basement of their meeting-house in that town, consisting of a large store room divided into two shops, "to hold for the term of three years" from that date, "with the privilege of two years in addition unless the society shall sell said store, in which case the

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privilege of two years in addition shall be null and void," and with a limitation of the privilege of underletting to the north shop only; and it was then "understood" between the lessee and prudential committee, by whom the lease was executed in behalf of the society, "that the privilege of underletting the north shop would be used by said lessee in underletting the same to the defendant, to carry on the millinery business therein on her sole and separate account."

"About August 1, 1863, the defendant, by virtue of an oral agreement with her said husband, went into occupation of said north shop, and continued to occupy said shop and carry on business therein, on her sole and separate account, apart from her said husband, paying him rent therefor, until the commencement of these actions. During all this time said John S. Hull and said defendant were living together as husband and wife, making one household." On January 16, 1865, the defendant filed in the office of the town clerk of Westfield a certificate under the St. of 1862, *c.* 198, concerning her separate business.

On April 2, 1866, the society conveyed their meeting-house and land, including the leased premises, to Josiah S. Knowles, the plaintiff in the first of these two actions; who on April 13 gave the defendant written notice of his deed and to quit, and served a like notice on John S. Hull, and on April 24 began against him the action on the Gen. Sts. *c.* 137, reported 97 Mass. 206, (the record and all the proceedings in which were made a part of this case,) wherein at September term 1867 of this court it was decided that "the privilege of two years in addition," contained in his lease, was made void by the sale and conveyance to Knowles, for whom judgment was ordered in said action.

On January 8, 1867, Knowles conveyed the whole premises to Lemuel B. Blood and Asa B. Whitman, partners under the firm of Blood & Whitman, the plaintiffs in the second action, "and delivered to them possession of said property, and they received rents for the use of the other shop in said basement from that time." "After the execution of the deed of Knowles to said Blood & Whitman, said Blood had several interviews

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with the defendant, extending over the time from Knowles's deed to the time of the decision of the former suit at September term 1867, in which interviews said Blood informed the defendant that he had a deed of said premises from said Knowles, and that, if she remained in occupation, he should expect from her rent; but the defendant refused to pay them rent, and claimed a right to remain in possession under her agreement with her said husband, and refused to acknowledge any title in Blood to the shop occupied by her. At different times subsequently, during her occupation and before the commencement of these actions, she and said Blood & Whitman had negotiations with each other respecting the settlement of the claim of said Blood & Whitman for the rent of said shop occupied by the defendant, and mutual offers were made by each to the other respecting the terms upon which said Blood & Whitman would fit up both shops and lease the same to her for a term of years; but no arrangement was made by the parties until October 1, 1867, immediately after the decision in the action of Knowles against the defendant's husband," when Blood & Whitman made a written lease to the defendant for five months of the shop of which she so continued in occupation; and "at no time was any notice to quit given to the defendant by said Blood & Whitman."

"Neither said John S. Hull nor the defendant ever paid any rent for the use and occupation of said demised premises, to either of the plaintiffs, since April 1, 1866.

"The court upon the foregoing facts found for the defendant, and ruled that the defendant did not sustain the relation of tenant to any one; that by her agreement with her husband she took no estate in the building, and the tenancy of her husband still continued, though she was in occupation; and that he, and not she, was liable for the rent, or for use and occupation."

E. B. Gillett, (*H. B. Stevens* with him,) for the defendant.

M. B. Whitney, for the plaintiffs.

Hoar, J. The defendant, being a married woman, could make no contract for the use and occupation of real estate, unless as her sole and separate property, or under her statute power to carry on business on her own separate account. She could

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derive no title to it by a contract with her husband. She made no contract with the plaintiffs, but occupied, and always claimed to occupy, under her husband, denying the plaintiffs' title.

These considerations are decisive of the case. The plaintiffs seek to charge her for rent as a tenant at sufferance, under the Gen. Sts. *c.* 90, § 25. But she was never their tenant in any form. An "understanding" between her husband and the Baptist Society, that she would occupy for her separate business a part of the premises which the society leased to him, could not make her a tenant, or give to her husband's attempt to underlet to her any validity which the law would not otherwise allow. Her possession, derived wholly from him, was his possession, notwithstanding the formality of paying him rent. He could not give her any title or estate by any grant or form of conveyance or contract, because the law does not empower her to contract with her husband, and as to him she was not in this respect empowered to act as a *feme sole.* Her possession being always that of her husband, when his tenancy was terminated her continued occupation under him made him the tenant at sufferance and liable for rent. On the recovery by the plaintiff Knowles in the suit of *Knowles* v. *Hull*, reported 97 Mass. 206, the present defendant might have been removed from the shop by the process which issued under that judgment. *Lord* v. *Parker*, 3 Allen, 127. *Edwards* v. *Stevens*, Ib. 315. *Ingham* v. *White*, 4 Allen, 412. *Gay* v. *Kingsley*, 11 Allen, 345. *Baxter* v. *Knowles*, 12 Allen, 114. Gen. Sts. *c.* 108, §§ 5, 10. 1 Washb. Real Prop. 392.

An action in the nature of assumpsit for use and occupation depends upon a contract, express or implied. *Cobb* v. *Arnold*, 8 Met. 398. The defendant made none with either of the plaintiffs; never held as their tenant; denied their title; and occupied only in right of her husband. *Judgment for the defendant.*

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Mary W. Merrick *vs.* Isaac H. Plumley & others.

In an action of tort in the nature of trespass *quare clausum fregit*, the defendant set up in justification a license from the plaintiff through an agent, and offered in evidence an agreement under seal containing such a license, but executed by the agent in his own name; which, on the plaintiff's motion, was excluded as not binding on the plaintiff. The defendant was then permitted, against the plaintiff's objection, to prove a previous oral agreement on the same subject between himself and the agent within the scope of his agency. *Held*, that if the oral evidence did not vary the effect of the writing the plaintiff had no ground of exception.

Evidence that a farm, conveyed by a husband to his wife's brother and by him to her, was occupied by her and her husband, and worked by the latter, who sold produce from it, and let a small tenement belonging to it; together with her testimony that she left the matter of the quarries mostly to her husband; is sufficient to warrant a finding that it was within the scope of his authority, as agent for his wife, to dispose of the privilege of quarrying and removing stone from a ledge on the farm.

In an action of tort by a married woman for quarrying and carrying away stone from her land, evidence that she saw the stone (which was quarried within fifty rods from her dwelling-house) carried by her door from time to time during a year, knowing that the defendant supposed himself to have a license to quarry and remove it, is competent evidence of a license from her to him to do so.

Tort against the members of the building committee of the Methodist Episcopal Society in Wilbraham, for entering the plaintiff's close, and quarrying and carrying away stone therefrom. Writ dated May 25, 1867. The defendants set up in justification of their acts a direct license from the plaintiff's husband as her agent, and an implied license from her knowledge of such acts and assent thereto.

At the trial in the superior court, before *Brigham*, J., "it was admitted that the plaintiff was the owner of the close; that it was situated within fifty rods of her homestead; that all the stone there quarried by the defendants was carried by her dwelling-house, and that the defendants, before commencing to quarry and remove the stone, obtained a license therefor from Samuel F. Merrick, the plaintiff's husband, over his own signature;" and there was evidence tending to show that he "was the owner of a lot of land adjoining the premises of the plaintiff, (both lots being included in what was known as the saw-mill lot,) and on which there was also an open quarry of the same kind of stone as that on the land of the plaintiff." "There was also evidence

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tending to show that the defendants commenced drawing the stone in July 1866, and continued the same without interruption or objection by the plaintiff until the commencement of this suit. The plaintiff denied this, and offered evidence to the contrary."

The defendant Plumley testified that in June 1866 he made an oral agreement with the plaintiff's husband for a right to quarry and carry away the stone in dispute, which agreement was the next day reduced to writing and signed and sealed by the plaintiff's husband and himself; and "that the written contract set out correctly the agreement between them." "The defendants' counsel then asked him to state the oral agreement. To this parol evidence the plaintiff objected. The defendants then offered to put in the written contract. The plaintiff objected; and the judge excluded the same at the plaintiff's request, and then admitted the parol evidence offered, it being also admitted on both sides that the plaintiff's husband had no authority to make a contract for her under seal. The witness testified, among other things, that by the oral agreement the defendants were allowed to quarry the stone wherever they pleased on the whole lot; also that he agreed with the plaintiff's husband to pay one hundred and twenty-five dollars and quarry stone to the same point." "The plaintiff's husband, being called, denied that he gave the defendants the right to take stone wherever they pleased on this lot, or that he made any agreement with them differing from the terms expressed in the written contract," which then "by the consent of both parties was permitted to be read to the jury as a memorandum," and in substance was as follows: "Samuel F. Merrick, of the first part, agrees to permit the said Plumley, as agent and in behalf of the building committee of the Methodist Episcopal Society, of the second part, to enter upon the premises of the said Merrick, and quarry out and obtain and cart away, from any or all of the open quarries in the lot where the saw-mill formerly stood, all the foundation stone that may be needed, and all the block or rubble stone which may be required to build and complete a stone church and chapel," according to the plans of a certain architect. "The said committee are further allowed to

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occupy and use the small barn near one of the quarries above described, as a deposit for the tools." "And the said Plumley, as agent for the said committee, agrees to pay the said Merrick the sum of one hundred dollars when the walls of the main building are completed; and the committee are by this instrument bound unto the said Merrick for the faithful performance of this contract, in the payment of the considerations above named. It is understood that the said Merrick makes no reservation of any stone quarried out or uncovered in the said lot; and it is further agreed that, if the said committee or their agent shall find it necessary to take any stone which the said Merrick has designated as specially reserved, then and in that case the said committee or their agent shall pay to the said Merrick the further sum of twenty-five dollars when the entire walls are completed. It is further understood that the committee have full permission to use the stone either in blocks or rubble, or both, as they may choose." This was signed by Samuel F. Merrick and the defendant Plumley with their individual names only, and sealed; and appended to it was the following sentence, signed in like manner: "It is intended to lay a wall in style similar to said Merrick's barn, and that is the meaning of the word rubble."

The judge instructed the jury that this written contract "was to be received and treated by them as an unsigned contract or memorandum merely, and that, in ascertaining the contract between the defendants and the said Samuel F Merrick, they might take either the recollections of the defendants' witnesses or the plaintiff's witnesses, and, in determining which were correct in their testimony, might take into consideration this memorandum."

"For the purpose of showing that Samuel F. Merrick was authorized to sell the stone to the defendants, as the general agent of the plaintiff, the defendants were allowed to offer evidence that he had managed the farm of the plaintiff on which these quarries were situated; that his management had consisted in working the farm, in selling the produce, such as the hay, butter and eggs, and in one instance a steer from the cattle on the farm, and in letting a small tenement on the farm. The

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plaintiff denied that her husband had exercised any control in the management of the farm, and offered evidence tending to show that she, as well as himself, had sold the produce of the farm; that she had made all contracts relating to the cutting of the wood and timber and repairing the buildings on the farm; that she had collected the rents of the tenement; that no stone had been quarried from the farm since she became the owner of it, and that the largest portion of the stone taken by the defendants was taken from quarries newly opened by them; that her husband had only assisted her from time to time, as she needed his assistance, and that she had never appointed him as her agent. She further testified that she was willing to sell the stone for a proper consideration, but had not been asked; and that she had left the matter of the quarries mostly to her husband. It was also in evidence that the premises had been owned and occupied by said Samuel F. Merrick for many years, until 1862, when they were conveyed by him to a brother of the plaintiff by a deed recorded, and, soon after conveyance to said brother, were by him conveyed to said plaintiff by a deed never recorded; that said plaintiff and husband had always since occupied the premises, and none of the defendants ever knew or heard of any change in the ownership or use of said farm.

"Upon this evidence, the plaintiff requested the judge to instruct the jury that there was not to be inferred from the fact, if believed by the jury, that the plaintiff's husband had the general management of this farm, any authority in him to permit the defendants to quarry and remove the stone belonging to the plaintiff. This request the judge refused, but did instruct the jury that a previous authority to give such an express oral license, by the plaintiff to her husband, may be inferred by the jury from the conjugal relations of the plaintiff and her husband, taken in connection with the circumstances under which she acquired title to her land, the functions which her husband with her knowledge and consent exercised in the management of her land, in disposing of its crops and products, management of its tenements, &c., and advising, directing and controlling the same, provided it was within the scope of these functions,

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as understood between them, to dispose of the stone in these quarries, and the privilege to quarry and carry away stone thence as commercial products of the farm, whenever the same could be done advantageously and profitably to the plaintiff."

It was not contended by the defendants that the plaintiff was present when the parol agreement was made between them and her husband, nor that it was made known to her; but they offered evidence tending to show that she was present and knew the substance of the written contract at the time of its execution. The plaintiff, however, and her husband, both "denied that she had any knowledge of the contents or purport of the written contract, or that she knew whether the stone was taken from the quarries on her own land or her husband's, until after the defendants began to open new quarries on her land."

"The plaintiff asked the judge to instruct the jury that there was no evidence of her assenting to the written contract, or any other, to remove this stone, from the fact that she saw it, from time to time, carried by her door; and also that her assent to the removal of this stone could not be implied from any knowledge of the written contract. The judge declined to give this instruction, but did instruct the jury as follows: If the plaintiff's husband undertook, without any previous authority, to give such an express license in words, reduced to the form of a written contract, in his own name, and the plaintiff, being notified of that fact and the full effect upon the land and the quarries, allowed the defendants to act upon such license, in relation to the land and quarries, without interruption and objection thereto within a reasonable time, the jury would be authorized to infer that she ratified a license commensurate with the terms of such express license, giving to such license the effect only of evidence of a parol license of the same terms. And he further instructed the jury that, irrespectively of any express license by the plaintiff, or by her authorized agent, through a previous authority for or ratification of his acts on her behalf, the defendants might acquire an implied license by such conduct and acts of the plaintiff and defendants in relation to each other, which were known to both of them, as indicated that the defendants,

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acting for successive weeks and months under a supposition that they had such a license, proceeded upon the plaintiff's land and quarried and carried away stone therefrom, with the plaintiff's full knowledge of the supposition of the defendants and their acts under it, and without any objection on her part.

"The quarries on the plaintiff's lot were partly open, and partly unopened, and covered with earth. There was evidence tending to show that a portion of the unopened and covered quarries were, by the agreement between Samuel F. Merrick and the defendants, reserved and not to be worked unless it should be found necessary by the defendants and their agents; and that most of the stone taken by the defendants was quarried from this reserved tract, while a considerable quantity of stone, suitable for the purposes of the defendants, still remained in the open quarries.

"The plaintiff asked the judge to rule that if the jury believed that the license given to these parties was embodied in the written memorandum put into the case, and that there was any reserved stone on the lot, the defendants were not authorized to quarry and make use of this reserved stone until they had exhausted the open quarries of building stones like those in Merrick's barn. This ruling the judge declined to give, except so far as the same was given in the following instruction: The questions for the jury are, whether the defendants had such a license, and acted within it. If the defendants had a license derived in any of the modes indicated, they must prove by the preponderance of their evidence, and upon the whole evidence, that their acts were within the scope of their license. Whatever of their acts were in excess of their rights under their license were in violation of the plaintiff's rights; and, so far as they were injurious to her, she is entitled to recover indemnity for such injury."

The jury found for the defendants; and the plaintiff alleged exceptions.

N. A. Leonard, for the plaintiff.

M. P. Knowlton, for the defendants.

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GRAY, J. The court is of opinion that the plaintiff shows no just ground of exception to any of the rulings or instructions of the judge before whom the trial was had.

The defendants, being sued in tort for entering upon the plaintiff's land and quarrying and removing stone therefrom, set up in their justification license from the plaintiff herself and from her husband as her agent. They offered in evidence an agreement under seal, containing a license to them, but executed by the husband in his own name, and which was excluded on the plaintiff's motion as not binding upon her. The defendants were then permitted, against the plaintiff's objection, to prove the oral agreement made between them and the husband. We are not prepared to say that an instrument under seal, executed by an agent in such a manner as to bind him personally and not his principal, and ruled out of the case upon the principal's objection, prevents the other party from proving an earlier oral agreement upon the same subject, made by the agent within the scope of his authority, though different from the written contract.

But it is unnecessary to express a positive judgment upon that question; inasmuch as we are of opinion that in this case the terms of the oral contract of which evidence was permitted to be given did not differ in legal effect from those of the writing. The testimony introduced by the defendants was, that, by their oral agreement with the plaintiff's husband, they were allowed to quarry the stone, "wherever they pleased," on the whole lot of the plaintiff, and were to pay for such license the sum of one hundred and twenty-five dollars. By the writing, it was stipulated that, if the defendants should "find it necessary to take any stone which the said Merrick" (the husband) "has designated as specially reserved," they should pay the sum of twenty-five dollars, in addition to the sum of one hundred dollars previously agreed to be paid in any event. The defendants were thus made the only judges of the necessity of taking any of the stone designated as specially reserved, and had by the terms of the written, as by those of the oral license, the right at their own election to take stone from any part of the lot, in consider-

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ation of the gross sum of one hundred and twenty-five dollars. The memorandum added below the signatures to the writing clearly referred to the style of the wall of the barn previously built, only for the purpose of explaining the meaning of the word "rubble," and not of limiting the place from which the stone might be taken. Even if, therefore, the oral evidence was wrongly admitted, yet, as it did not vary the legal effect of the writing, the plaintiff was not injured by its admission. *Crittenden* v. *Field*, 8 Gray, 621. *Smith* v. *Faulkner*, 12 Gray, 251.

The defendants introduced evidence that the farm on which the quarries were had been conveyed by the plaintiff's husband to her brother and by the latter to her, that she and her husband together had since occupied the premises, and that he managed the farm, sold the hay, butter and eggs, and let a tenement thereon; and the plaintiff herself testified that "she had left the matter of the quarries mostly to her husband." This evidence warranted the jury in finding that it was within the scope of his agency, as understood between him and his wife, to dispose of the stone and of the privilege to quarry and remove it; and was submitted to the jury with suitable instructions. The conjugal relation of the parties was only treated as one element, to be considered in connection with the other facts proved.

Evidence that the plaintiff saw the stone (which was quarried within fifty rods of the dwelling-house) carried by her door from time to time during a year, knowing that the defendants supposed they had a license to do so, was competent evidence of a license from her; and was submitted to the jury under instructions sufficiently favorable to the plaintiff.

Exceptions overruled.

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Clement B. Drake *vs.* Hamilton Woolen Company.

A mill owner is not liable under the mill act, Gen. Sts. c. 149, for any injury done to intervening land by letting down water from his reservoir dam for the use of his mill, for which he would not be liable at common law.

If the owner of a mill and a reservoir dam on the same stream renders intermediate land wet and less valuable for cultivation, by letting down water from the dam in the dry season of the year, he is not liable in damages, if the water which he lets down is reasonably necessary for the use of his mill, and does not increase the volume of the stream beyond its usual limit, or overflow its natural channel; nor is liable in damages for flowage if the water which he lets down, and which, if unobstructed, would not flow the intermediate land, does flow it by filling a pond which is raised by the dam of another mill owner who has a right to flow it by that dam at all seasons of the year.

Complaint under the mill act, Gen. Sts. *c.* 149; referred in the superior court, by agreement of the parties and under a rule of the court, to arbitrators, who returned an award in favor of the complainant, of which the following are the material parts:

"The complainant's land, for the injury to which he seeks compensation by this proceeding, is situated on the banks of a natural pond in the town of Holland, commonly known as Holland Pond. The Quinebaug River flows through this land, and empties into and passes through said pond. In the year 1865 the respondents erected a dam across said river, above the complainant's land, for the purpose of creating a reservoir, from which, in the dry season, they may supply their mills, which are situated on said river in the town of Southbridge in the county of Worcester. The respondents began to use said dam by sending down water therefrom in July 1866, and at this time there had existed for many years a mill dam across said river, below said pond, and below the complainant's land, known as the East Brimfield dam, which had been accustomed to set back the water of said stream, during the time of high water, upon said pond, and to some extent upon the complainant's said lands, the water overflowing said land during some part of the year to an extent which, if continued through the dry season of summer, would be more than sufficient to cause all the injury complained of. This dam had existed for more than twenty years, and

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Elbridge G. Fuller, the former owner of the complainant's land, and the immediate grantor of the complainant, had formerly instituted a complaint against the owner of said dam, and recovered an annual compensation, and on June 1, 1848, conveyed to Ezra Perry, Jr., the then owner of said dam, the right to flow said land by said dam, at its height at that time, which has not since been increased. The complainant objected to the introduction of said deed; but the objection was overruled, and the deed admitted." The grant in this deed was to said Perry, his heirs and assigns, forever, of "the right, title and privilege to flood and to flow at all seasons of the year all the land that I own in Holland aforesaid that can be flowed by the water above the dam of said Perry at his manufactory in Brimfield, with a dam in the same place and of the same height of the present dam taken at its general level as it is now constructed; and the said Perry, his heirs and assigns, are to have full power to flow the same as above without any claim or demand for damage from me, my heirs and assigns, forever."

"When the dry season of summer comes on, and the water commonly flowing in the river is insufficient for the use of the respondents' mills, they open the gates of their reservoir dam, and send down into the channel of the river such a quantity of water as is reasonably necessary for the beneficial operation of their said mills. The quantity of water so let down from said reservoir is not larger than is accustomed to flow in some seasons of the year, but is very much larger than the accustomed flow of the stream in such dry season; and the result is, that the channel is more uniformly full of water through the year. The natural channel immediately below the respondents' dam, and above the complainant's land, is sufficient to carry all the water which the respondents send down from their reservoir; and, although the banks are lower, and the fall less rapid below said land, if it were not for the East Brimfield dam, such water would pass off into Holland Pond, and through the river below said pond, without injury to the complainant. But in the existing condition of Holland Pond, and the river below the same, and of the East Brimfield dam, the water so let down by the

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respondents in the dry season does in fact spread out over the complainant's land, spoiling his grass and deteriorating and diminishing the value of his land.

"Before the erection of the respondents' reservoir, reservoir dams had been in existence since 1828, and still continue to exist above the complainant's land and above the respondents' reservoir, which had been accustomed to discharge their waters during the summer season in a similar manner to that above described, and producing an effect of the same kind, but to much less extent, upon the complainant's land.

"The respondents contended that, under the state of facts disclosed by the case, the arbitrators should be governed by rules and principles of law stated as follows:

"'The respondents are not liable under mill acts for damages for any acts which they had a right to do, as landowners, at common law.

"'The right of the complainant, as owner of land bordering on a natural stream, is not an absolute right to have the water flow upon his premises in its natural manner, but to receive it subject to and affected by such reasonable uses as owners above may have occasion to make of it.

"'If the water passes through the land of the owner below in its natural channel, the upper owner is not liable if he detains it for the purpose of a reasonable use for his mill, even if he sends it down in a mode different from its natural flow, so that the channel is kept more uniformly filled with water through the year, and so that in the summer months the adjacent meadows of the lower owner are not so thoroughly drained, and the water percolates them during the summer from the stream under the earth, and thereby an inferior quality or smaller quantity of grass is produced.

"'When, in the case above supposed, the land of the lower owner is flowed by a dam rightfully erected still further below, for which flowing through the entire year damages have been assessed and paid, or by the discharge over it of water from reservoirs above, which discharge is shown to be rightful, either by prescription or by the mill acts; such flowing is to be taken, for

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the purpose of applying the foregoing principle, as the natural condition of the stream, and the builders of a new reservoir above are not liable for damage, if in making such reasonable and proper use of the water as is requisite for their own mills they send it down more uniformly through the year than it otherwise would pass, provided they do not cause it to rise above the limits to which it was before accustomed, and do not send down more water than enough to fill the natural channel, even if it is thereby kept up to its ordinary limit for a longer time and the consequences above stated follow.

"'If they have used their reservoir in a manner reasonably necessary for the purposes of their mill, and have done nothing wantonly to injure the complainant, and have sent down the water from their reservoir in the natural channel only, they are not liable, although the water is so sent down during the summer months, when before there was less water in the stream.

"'If the complainant or those under whom he claims had conveyed to a mill owner below the right to flow his land and obstruct the natural and usual discharge of the water therefrom, and such right was in fact exercised, the respondents are not liable if they send down no more water than the channel of the stream, if not so obstructed, would carry off, even though the water so sent down in fact sets up over the complainant's land.

"'The principle above stated would be true, if the right to flow below had been taken by a complainant under the mill acts.

"'The efficient force of the Brimfield dam is to be considered as raising the water to the height to which it would carry it at its ordinary stages, although in dry seasons it was in fact accustomed to fall below such height; and, in considering the value of the complainant's land for the purpose of estimating his damages, it must be considered as subject to the incumbrance of a vested right in the owners below to raise the water at all seasons of the year to the height to which the Brimfield dam would raise it.'

"The arbitrators, having found the facts of the case to be as hereinbefore stated, declined to adopt the view of the respond-

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ents to the extent above expressed, but held the rules and principles applicable in the determination of the case to be as follows:

"The several rights to flow the complainant's land, vested in the proprietors of the East Brimfield dam by grant, and in the proprietors of the reservoirs above the respondents' reservoir by prescription or by virtue of the mill acts, are incumbrances upon the complainant's land, and to be taken into account by the arbitrators in determining the value of said land and the amount of damages sustained.

"The respondents have a right to construct their dam and reservoir under the provisions of the mill acts, but, in determining the question of their legal liability for any injury caused to the complainant by the operation of the same, regard must be had to the actual, existing condition of the pond and river below said reservoir at the time and before said reservoir was created; and if the respondents, in operating said reservoir by sending down water therefrom, do in fact overflow and injure the complainant's land, they are liable for such injury in this proceeding, although they may send down no more water than the stream, if not obstructed by the East Brimfield dam, would carry off without injury to the complainant's land, and no more than is reasonably necessary for the beneficial operation of their mills, and although the former owner of the complainant's land has granted to the proprietors of the East Brimfield dam the right to flow said land to the extent and under the circumstances before stated.

"In determining the amount of damages sustained by the complainant to the date of their award, the arbitrators will be governed by the actual facts of the case as disclosed by the evidence, and allow for the excess of injury caused to the complainant's land by the operation of the respondents' dam and reservoir over and above any injury caused to said land by the combined operation of the East Brimfield dam and the ancient reservoirs above the reservoir of the respondents.

"In determining the amount of the complainant's future annual damages, and the damages in gross, the arbitrators will

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endeavor to ascertain and determine, taking into consideration the character, capacity and condition of the stream, the situation and condition of the complainant's land, and the right to flow acquired by the proprietors of the East Brimfield dam and of the ancient reservoirs, to what extent the land of the complainant will be injuriously affected by the exercise of such existing rights and by other causes independent of said dam and reservoir of the respondents, and allow to the complainant such damages only as in their opinion will be a just and reasonable compensation for such additional injuries as will result to the complainant's land by means of said dam and reservoir."

The respondents objected to the acceptance of the award; and asked for rulings that the rules of law adopted by the arbitrators were incorrect; that the rules should have been applied which were requested; and that on the facts found and reported by the arbitrators the respondents were entitled to judgment. This *Devens*, J., refused, and ordered the acceptance of the award and judgment for the complainant. The respondents alleged exceptions.

G. F. Hoar & A. J. Bartholomew, for the respondents.

H. Morris, for the complainant.

CHAPMAN, C. J. This case depends principally upon the rights of the parties at common law. The rights of riparian proprietors to vary the natural flow of a stream in order to use it most advantageously for the working of mills was thoroughly considered in the case of *Gould* v. *Boston Duck Co.* 13 Gray, 442. In that case the plaintiff was proprietor of an ancient mill. The defendants had, within twenty years, built a factory a short distance above the plaintiff's mill, and erected a dam across the stream, by means of which they raised a large pond. Their works did not, in ordinary stages of the water, affect the plaintiff's mill; but the size of their factory was adapted to the usual flow of the stream; and therefore it happened that in times of very low water it required more power than they could derive from the natural flow to drive their machinery. In the latter part of the day their pond was drawn down considerably below the top of the dam, and they ceased to have a sufficient head.

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They then shut their gates, and stopped the flow of the water till their pond became full. When they hoisted their gates the next morning, they let down, for the purpose of carrying their works, a much larger quantity of water than the plaintiff could use at his smaller mill. It was held that a riparian proprietor might thus disturb and vary the natural flow of a stream, for the purpose of driving machinery, notwithstanding its injurious effect upon an ancient mill below him. The right is founded upon the consideration that water power is property of great value, and that a large part of the power must run to waste if mills may not be constructed sufficiently large to use all the power of the stream at its ordinary height; and, if mills of such a character may be constructed, it is but reasonable that the proprietor should have a right to husband the power in seasons of extraordinary drought, so that he may use it most advantageously, and not be compelled to let his machinery and workmen remain entirely idle till the stream may be raised by rains. It is a reasonable use of his right with reference to the proprietors below him. If they use the whole power of the stream, it benefits them equally with himself. It is only when they allow a part of their power to run to waste in ordinary stages of the water that they are injured by such use; and the injury to them is comparatively trifling. This interpretation of the rights of riparian proprietors tends to promote the interests of the public, because it enables the owners of water power, which has proved to be a species of property of great value to the public, to avail themselves of it to the utmost extent that can be deemed reasonable.

It is obvious that this exercise of the right to vary the natural flow of the stream not only affects the mill owner immediately below, but affects the stream for a considerable distance, at some times increasing its volume, and at other times diminishing it. And the proprietor may make his pond as large as the situation of the land above him will permit, thereby creating a large reservoir to be used in seasons of drought, and varying the flow of the stream. He may also erect a dam far above his mill, to be used merely as a reservoir dam. He is authorized by our stat-

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utes to flow the land above such dam on payment of damages. *Wolcott Manufacturing Co.* v. *Upham*, 5 Pick. 292. *Shaw* v. *Wells*, 5 Cush. 538. By means of such a dam he may hold back the water in his reservoir till he needs it for his works in a season of drought, and then let it down in such quantities as considerably to increase the volume of the stream. Such reservoir dams are becoming more important than they formerly were, because the clearing, cultivation and drainage of marshy and swampy grounds is gradually destroying the natural reservoirs which formerly supplied more or less water to most of our streams through the whole year. The principal question raised in the present case is, to what extent a riparian proprietor, who has erected a reservoir dam for the benefit of his mill situated at a distance of several miles below, may so let down the water in seasons of drought as to increase the volume of the stream, without exceeding his rights as such proprietor, and becoming liable to pay damages to intermediate proprietors for the interruption it may occasion to the drainage of their lands. The court are of opinion that it is not an unreasonable exercise of his rights to increase the volume of the stream to any extent that shall not exceed the usual and ordinary flow, nor overflow the natural banks. This will enable the proprietors of mills to avail themselves of all the power which a reasonable use of the stream affords, and will subject the proprietors of the lands that border on the stream to no unreasonable burden.

In the present case it does not appear that, if the natural channel had been left unobstructed below the complainant's land, any injury would have been done to him. On the contrary, it is found that the water which came from the respondents' reservoir dam would pass off within the natural banks. But Mr. Fuller, the former proprietor of the complainant's land executed a deed to Ezra Perry, Jr., conveying to him, his heirs and assigns forever, the right, title and privilege to flood and flow, at all seasons of the year, all the land he owned in Holland, that could be flowed by a certain dam, and describing the dam that has ever since existed below the complainant's land. This is a right to flow the land by means of any water that any

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party would have a right at common law to send down the stream. It is by means of this dam that the stream is raised above its natural banks so as to overflow the complainant's meadow in the manner described in the complaint. But for this artificial structure, which has been erected under a right derived from the complainant's grantor, the water would have passed off in the natural channel. The acts of the respondents are not therefore the direct cause of the injury complained of. They would not cause the water to overflow the banks; but the structure below raises it up and causes it to spread over the meadow. The respondents have merely exercised their riparian rights; and, upon the facts found by the referees, the complainant has no cause of action. *Exceptions sustained.*

WILLIAM BALL *vs.* GEORGE NYE.

One who maintains a vault so that with his knowledge filthy water habitually filters from it, whether above or below the surface of the ground, into land of a neighbor, where it injures a cellar and well, is liable in damages for the injury, without other proof of negligence.

TORT, alleging that the defendant wilfully caused and negligently permitted the discharge of filthy matter from the vault of his barn into the plaintiff's cellar and well, tainting the water in the well and rendering the cellar unwholesome.

At the trial in the superior court, before *Devens*, J., there was much evidence, which was reported in full in the bill of exceptions, and by which it appeared that the plaintiff and the defendant owned adjoining lots on East Union Street in Springfield, which sloped so that the defendant's land was higher than the plaintiff's; that in 1864 the plaintiff built an addition to his house and dug a well in the cellar under the addition; that in November 1865 the defendant built a barn on his lot, constructing a vault underneath it with walls of brick but no other floor than the earth and without a drain, the distance of the wall of the vault from the wall of the plaintiff's cellar being about three feet and a half, and from the centre of the well in the plaintiff's

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cellar about thirteen feet and a half, the bottom of the vault five feet and a half higher than the bottom of the well, and the soil sandy; that the defendant suffered manure to accumulate in the vault of his barn, which, after a time, by percolating the intermediate soil, rendered the water in the plaintiff's well yellow in color and offensive to the taste and smell, and also passed beneath the plaintiff's cellar wall and oozed to the surface in the cellar; and that, although the existence of the nuisance was brought to the defendant's attention several times by the plaintiff, yet the defendant suffered it to exist from May 1866, when it first began sensibly to affect the plaintiff's cellar and well, to the commencement of this action in January 1867.

The defendant "conceded that percolations passed underground from the vault of his barn into the plaintiff's well and cellar," but requested the judge to rule "that the plaintiff could not recover upon the testimony; also that he could not recover under the form of declaration in the case; also that he could not recover unless the jury were satisfied that the injuries resulted to him from the wilful or negligent conduct of the defendant, and that whether or not he had been negligent was a question for the jury; also that it was a question for the jury whether or not the defendant had negligently kept and accumulated manure or other filth in his vault, and whether or not the contents of said vault percolated through the soil into the plaintiff's well and cellar by reason of any improper or negligent construction of this vault, or negligent keeping or having the contents of said vault in the same; also that the plaintiff could not recover for injuries resulting from percolations through the defendant's soil and then through the soil of the plaintiff into the cellar and well of the plaintiff; also, if he could, he could not without proof that the percolations resulted from some negligence or fault on the defendant's part; also, if liable for percolations into the cellar, the defendant was not liable for percolations into the well."

The judge refused so to rule; and instructed the jury "that the defendant was bound to so construct his vault that the contents thereof should not percolate through into the plaintiff's cellar and well, and, it being conceded that percolations did pass through, to the plaintiff's injury, such percolations were

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evidence of negligence, upon which the plaintiff was entitled to a verdict;" and he therefore directed a verdict for the plaintiff. The defendant alleged exceptions.

M. P. Knowlton, for the defendant. The conceded facts were, that the defendant built a barn with a cellar vault on a side hill, and percolations passed from his cellar through the earth into the plaintiff's cellar and well, further down the hill. The judge ruled that on these facts alone the plaintiff had a right of action. But the defendant's acts were upon his own premises and lawful in themselves. The plaintiff cannot recover without proving that the injuries resulted from wilful or negligent conduct. *Rockwood* v. *Wilson*, 11 Cush. 226. *Tourtellot* v. *Rosebeck*, 11 Met. 462. *Brown* v. *Kendall*, 6 Cush. 292. The declaration sets forth no other cause of action; and the question of negligence is always for the jury. There can be no legal liability for damages to land by mere subterranean percolation. *Thurston* v. *Hancock*, 12 Mass. 220. *Greenleaf* v. *Francis*, 18 Pick. 117. *Brown* v. *Illius*, 25 Conn. 583. *Same* v. *Same*, 27 Conn. 84. *Roath* v. *Driscoll*, 20 Conn. 540. *Acton* v. *Blundell*, 2 M. & W. 348.

H. Morris, for the plaintiff.

Foster, J. To suffer filthy water from a vault to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well and cellar, where it is done habitually and within the knowledge of the party who maintains the vault, whether it passes above ground or below, is of itself an actionable tort. Under such circumstances the reasonable precaution which the law requires is, effectually to exclude the filth from the neighbor's land; and not to do so is of itself negligence. In the present instance, there was no pretence of a sudden and unavoidable accident which could not have been foreseen or guarded against by due care. The percolations appear to have been constant, and their existence to have been known to the defendant. The instructions asked for by his counsel were liable to mislead the jury, and those given were exactly accurate and appropriate to the case. *Baird* v. *Williamson*, 15 C. B. (N. S.) 376. *Rylands* v. *Fletcher*, Law Rep. 3 H. L. 330.

Exceptions overruled.

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IRA YEAMANS, JR. *vs.* IRA YEAMANS.

In an action on an award of arbitrators under a submission *in pais* by which the defendant undertook to do an act which he was not legally competent to perform, which undertaking was the consideration for the submission on the part of the plaintiff, *Held*, that the submission, not being binding on both parties, was binding on neither, and, with the award, was void.

CONTRACT on an award of arbitrators under a submission *in pais*. In the superior court, *Brigham*, J., ruled that the plaintiff could not maintain his action, and directed a verdict for the defendant. The plaintiff alleged exceptions. The case is stated in the opinion.

W. G. Bates & M. B. Whitney, for the plaintiff.

H. Morris, for the defendant.

FOSTER, J. This is an action upon an award, the validity of which is the question to be determined. An examination of the submission shows that the defendant agreed to convey to the plaintiff "all the lands unsold belonging to the estate of Gad Root, deceased," and to account with him for all the personalty and the proceeds of realty sold which the defendant had received from said estate. It appears that the defendant is one of two trustees under the will of Gad Root; and that the greater part of the beneficial interest of said estate has vested in the plaintiff.

Apparently the design of the submission was to settle by arbitration in the country the defendant's accounts as trustee, and to have him transfer to the plaintiff, as the party beneficially interested, the balance of the trust estate, both real and personal. But Ashur Root, a child of Gad, and one of the *cestuis que trust*, still survives, and has a life interest in one third of the trust estate; and some small portions of the lands of Gad Root remain unsold. The submission and award require a conveyance of them by the defendant; which, if it have any legal validity, would divest him of his trust estate and tend to disable him from performing his trust. Not only the income of this estate belongs to Ashur Root for his life; but, in case the

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income of his share should prove insufficient for his comfortable support, so much of the principal thereof as may be necessary for that purpose is also to be so applied.

It is plain that no such arrangement as the parties contemplated by this submission and award could operate to divest the defendant of his trust, or exonerate him from his duties and liabilities as trustee. He must continue clothed with the responsibilities of that position until discharged by a court of competent jurisdiction. Nor can the lands held in trust be conveyed by him so as to be held by a purchaser discharged of the trust (they could not be even by both trustees together) without leave of court; for the will contains no power of sale. We are inclined to think that the entire submission and award are void, as contrary to the policy of the law, and an attempt to dispose of a trust estate and settle the trustee's accounts in an irregular and improper manner. But we need not decide the case on this ground. It is certain that, if the award had required a payment of money by instead of to the plaintiff, he would not have been bound by it; because he could have made the unanswerable objection that it was not in the defendant's power to convey by a complete title the unsold lands belonging to the estate of Gad Root. No doubt an award may be good in part although void in part; which is a relaxation of the rigor of the ancient common law rule. But this is only where the good and bad parts are distinct and independent from each other, so that they can be separated without prejudice to the rights of the parties. The rule is clear, that "if that part of the award which is void be so connected with the rest as to affect the justice of the case between the parties, the award is void for the whole." Kyd on Awards, (1st Am. ed.) 170. *Chase* v. *Strain*, 15 N. H. 535. *Barrows* v. *Capen*, 11 Cush. 37.

Since, then, the plaintiff was not bound by the submission, it was destitute of that mutuality which was essential to its validity. *Keep* v. *Goodrich*, 12 Johns. 397. *Biddell* v. *Dowse*, 6 B. & C. 255. 2 Greenl. Ev. § 80. "If the submission does not bind all of the parties, it does not bind any." *Marsh* v. *Wood*, 9 B. & C. 659.

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To sum up the whole matter briefly: By the submission the defendant, Ira Yeamans, Sr., undertook to do an act which he was not legally competent to perform, namely, to convey away land which he held in trust under the will of Gad Root. This was the consideration for the submission on the part of Ira Yeamans, Jr.; and because it failed he could not be bound by either submission or award. The submission, not being binding on both parties, was binding on neither, and the plaintiff's

Exceptions are overruled.

INHABITANTS OF WILBRAHAM *vs.* INHABITANTS OF LUDLOW.

A person legally capable of choosing or changing his domicil, who is residing in a city or town in this Commonwealth with the purpose of there remaining for an indefinite time, and without retaining and keeping up any intention to return to his former home in another city or town in this Commonwealth, has his domicil in the place of his actual residence.

A person legally capable of choosing or changing his domicil, who abandons his home and thenceforth wanders from town to town, working as a day laborer, "with no purpose in view, and with no opinions, desires or intentions, in relation to residence, except to have a home wherever he works," ceases to have a continuing domicil, for the purpose of acquiring a settlement, in the town where the home is which he so abandons.

CONTRACT to recover money paid by the plaintiffs for the support of Daniel A. Warner as an insane pauper in the hospital in Northampton. Trial in the superior court, before *Lord*, J., who allowed the following bill of exceptions:

The only question in dispute was as to the settlement of the pauper. The plaintiffs admitted that he once had a settlement with them, but contended that he acquired a new settlement with the defendants under the Rev. Sts. *c.* 45, § 1, *cl.* 5, 12. "It appeared from the evidence that he was taxed in Ludlow a highway tax in 1850, and was taxed as a resident of Ludlow a poll tax in 1851, 1852, 1853 and 1854; that on March 28, 1855, he purchased and took a deed in fee simple of a dwelling-house and about one acre of land in Ludlow, and on March 31 purchased and took a deed of about thirty acres more of land in

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Ludlow; that for the years 1855, 1856 and 1857 he was taxed upon his poll and estate as a resident of Ludlow, and for the years 1858, 1859 and 1860 was taxed upon his estate in Ludlow as a nonresident, and, during all these years, from 1855 to 1861 inclusive, the property taxed was set in the valuation of estates at more than two hundred dollars; that in May 1855 he married Caroline Fuller, of Ludlow, and went immediately thereafter to live in the house purchased by him as aforesaid, and lived there until June 1857; that his wife left him in February 1857, obtained a divorce from bed and board in April 1857, and by a decree of the court all personal property which came by the marriage was given to the wife, and on May 2, 1857, she caused all the furniture to be removed from his house and carried away, except his trunk, containing some few articles, which have never been removed; that he worked for one Plumly in in Ludlow from May to August, 1857, and, taking a bundle of clothes, went to his brother's house in Wilbraham, and after that went to work as a day laborer, and worked about in the towns of Wilbraham, Springfield and Ludlow, until October 1861, when he went to Horace Clark, one of the selectmen of Wilbraham, for assistance, and remained there some two years or more, and until he was committed to the hospital, said Clark having been appointed his guardian just after October 1861; that in June 1857 he rented his house in Ludlow, but in renting it said he wanted one room to which he could go if he pleased, and it was thus occupied by tenants until April 1860, when it was sold for the payment of the taxes of 1858 and 1859. It did not appear that he spent a night at his house in Ludlow after June 1857. It appeared that he never occupied said room.

"The judge stated that he should rule and instruct the jury as follows: If after his house was leased in 1857 he left Ludlow and went to his brother's house in Wilbraham, and from that time forward he worked in different towns and for different persons, as he could find or was willing to accept employment, wandering about from town to town and place to place, with no purpose in view, and with no opinions, desires or intentions, in relation to residence, except to have a home wherever he

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worked, up to the year 1861, when he went into the family of Horace Clark, of Wilbraham, to remain permanently, and did so remain until he was committed to the hospital at Northampton, this kind of life would not continue his residence in Ludlow for the purpose of acquiring a settlement, after he left in 1857, although during the four years he worked two or three times for some persons in Ludlow.

"Under these circumstances, the counsel for the plaintiffs declined to argue the cause to the jury, and excepted to the foregoing rulings and instructions. A verdict was thereupon taken for the defendants, the counsel for the plaintiffs stating that under such ruling they did not claim a verdict."

H. Morris & C. A. Winchester, for the plaintiffs. 1. Under the Rev. Sts. *c.* 45, § 1, *cl.* 5, (Gen. Sts. *c.* 69, § 1, *cl.* 5,) the taxes assessed on the pauper's estate, and paid from 1855 to 1861 inclusive, were sufficient to give him a settlement in Ludlow, if in the sense of the statute "he dwelt and had his home" there during that period. So under the Rev. Sts. *c.* 45, § 1, *cl.* 12, the taxes assessed and paid between 1851 and 1861 inclusive were sufficient to give him a settlement in Ludlow, if in the sense of that statute he "resided" in that town during those ten years. For the purposes of these statutes, the pauper resided and dwelt and had his home in Ludlow, from 1850 till October 1861, when he went to the house of Clark in Wilbraham. That he resided in Ludlow from 1850 to 1857 inclusive, there can be no reasonable doubt. He was taxed there all that time as a resident; was married there; and lived there in his own house with his wife more than two years; and, his residence being so fixed, the presumption was that it continued until a residence elsewhere was proved. *Chicopee* v. *Whately*, 6 Allen, 508.

2. Leaving Ludlow, and wandering about from town to town, with no purpose in view, and with no opinions, desires or intentions in relation to his residence, would not destroy the continuity of his residence in Ludlow, although he worked there but a few times during those years. Upon the evidence, the jury should have been instructed that, if the residence of the pauper

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was once fixed in Ludlow, the presumption was that it continued there till the change of residence was proved; that he must have had a residence in some town; that he could have but one, and could lose one already acquired only by acquiring another; that, in order to have lost his residence in Ludlow, he must have gone to some other town, with a fixed purpose to remain, and not to return to Ludlow again to reside; that merely leaving Ludlow with an intention not to return, but without taking up his residence in some other place, would not break up his residence in Ludlow; that the fact and intent must concur: that he must not only have intended to leave, but must actually have left, and not only have intended to reside elsewhere, but have had some definite place where he intended to reside, and there have resided. *Bulkley* v. *Williamstown*, 3 Gray, 493. *Holmes* v. *Greene*, 7 Gray, 299. *Worcester* v. *Wilbraham*, 13 Gray, 586. *Littlefield* v. *Brooks*, 50 Maine, 477. The evidence would have warranted the jury in finding for the plaintiffs under proper instructions. The question of settlement is one to be determined by the facts and circumstances of each particular case, and peculiarly within the province of a jury. *Fitchburg* v. *Winchendon*, 4 Cush. 190.

M. P. Knowlton, for the defendants.

Foster, J. The question in the present case was, whether the pauper, whose settlement was once in the plaintiff town of Wilbraham, had acquired a new settlement in Ludlow. The burden of proof to establish this was on the plaintiffs. After the presiding judge had announced the rule of law which he deemed to govern the case, and the instructions which he proposed to give to the jury, the plaintiffs declined to argue the case, submitted to a verdict for the defendants, and alleged exceptions. Under these circumstances, the only question open for revision is the correctness of the rulings. The evidence is not for the court to pass upon, and is reported only to make the instructions intelligible and enable us to judge better whether they were pertinent and accurate.

The pauper leased his house in Ludlow in June 1857, and never lived in it again. He remained in that town, working as

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a laborer, until August in that year. He then went to his brother's house in Wilbraham, and afterwards worked about, as a day laborer, in the towns of Wilbraham, Springfield, and Ludlow, till October 1861, after which he remained in Wilbraham in the family of Horace Clark, who was about that time appointed his guardian, until he was committed as an insane pauper to the hospital at Northampton. The proposition to be maintained by the plaintiffs was, that after August 1857 he continued to reside in Ludlow within the meaning of the pauper laws; so that a settlement in that town could be subsequently acquired. There was certainly no actual continuance of his former home in that town; it was broken up and he had abandoned it, apparently without any intention to return there to live. But the argument for the plaintiffs is, that the pauper's domicil remained in Ludlow until he acquired a new one in some other town, and that, while absent in fact, he continued to live there in contemplation of law, and by such constructive residence the prescribed period for acquiring a settlement was completed.

Assuming that this view of the law is correct, and that domicil and residence are identical under the pauper laws, we are nevertheless of opinion that the rule of law stated to the jury was correct. If, from the time the pauper left Ludlow in August 1857, he had "no opinions, desires or intentions in relation to residence, except to have a home wherever he worked," then he did have in each successive town where he lived as a laborer a home and domicil so long as he remained there. It must be borne in mind that this was the case of one who had abandoned his former dwelling-place, either with no intention of return, or at the most with such vague, indefinite and remote purposes in this respect that they would not prevent him from readily acquiring a new domicil wherever he might go. The person was a day laborer without family, separated by judicial decree from his wife. Such a man, so situated, when he is laboring in one town with no other intention as to residence except to have a home wherever he works, may well be deemed to live there with the purpose of remaining for an indefinite period of time, and

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thus to have there all the home he has anywhere, as much of a domicil as such a wanderer can have. At least it was competent for the jury to come to that conclusion; and the instructions under which they did so were unobjectionable.

It is unnecessary to attempt a precise definition of the term domicil, as to which that eminent English judge, Dr. Lushington, has said that, "although so many powerful minds have been applied to the question, there is no universally agreed definition of the term, no agreed enumeration of the ingredients which constitute domicil." *Maltass* v. *Maltass*, 1 Rob. Eccl. 74. Story Confl. Laws, *c.* 3. Our own adjudged cases sufficiently establish the rule that one who is residing in a place with the purpose of remaining there for an indefinite period of time, and without retaining and keeping up any *animus revertendi*, or intention to return, to the former home which he has abandoned, will have his domicil in the place of his actual residence. *Sleeper* v. *Paige*, 15 Gray, 349. *Whitney* v. *Sherborn*, 12 Allen, 111. Where the question is one of national domicil, this statement may not be correct; for such a condition of facts might not manifest an intention of expatriation. But it is accurate enough for cases like the present, which relate to a change of domicil from one place to another within the same Commonwealth. *Exceptions overruled.*

COMMONWEALTH *vs.* JAMES CUSHING.

A vote of the selectmen of a town appointing a person "on police duty" is a sufficient appointment of him as a police officer, under the Gen. Sts. *c.* 18, § 38.

A police officer appointed by the selectmen of a town under the Gen. Sts. *c.* 18, § 38, need not be sworn to the faithful discharge of the duties of his office.

INDICTMENT for assault and battery of Eben B. Place, a police officer in the lawful execution of his office.

At the trial in the superior court, before *Ames*, C. J., the attorney for the Commonwealth stated that he should not contend

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that there should be a conviction "unless the court should rule upon the facts which were not in dispute that Place was a properly appointed police officer of the town of Holyoke;" and introduced in evidence the book of records of the selectmen of that town, containing the following vote: "Voted that Eben B. Place be appointed on police duty, and that he be detailed with George Clark on duty at the hill until further notice;" and, in proof of the qualification of Place, was permitted to introduce, against the defendant's objection, the testimony of the chairman of the selectmen that he administered to Place an oath, which was admitted to be proper in form. The judge ruled "on the whole case, that the person named in the indictment was duly appointed and qualified as a police officer of Holyoke;" the jury returned a verdict of guilty; and the defendant alleged exceptions.

G. M. Stearns, for the defendant. 1. Place was not properly appointed under the Gen. Sts. *c.* 18, § 38, for the selectmen could only exercise the power conferred by the statute according to its terms; *Commonwealth* v. *Higgins*, 4 Gray, 34; and he was not appointed in the language of the statute, nor substantially according to its terms. An appointment to a duty is not an appointment to an office, unless that duty pertains to one office and no other. Police duty pertains to many offices. An officer of the watch, appointed by selectmen under the Gen. Sts. *c.* 23, is appointed to police duties, but does not hold the office of police officer.

2. It was not competent to prove the qualification by parol. until it was first shown there was no record of it. *Pease* v. *Smith*, 24 Pick. 122. *Briggs* v. *Murdock*, 13 Pick. 305. *Bassett* v. *Marshall*, 9 Mass. 312.

C. Allen, Attorney General, for the Commonwealth.

CHAPMAN, C. J. The appointment of Place "on police duty" constituted him a police officer in conformity with the provisions of Gen. Sts. *c.* 18, § 38. It was not necessary that he should be sworn. Section 31 designates what officers are to be sworn. And see *Commonwealth* v. *Dugan*, 12 Met. 233.

Exceptions overruled.

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Epaminondas W. Buell *vs.* Edward W. Chapin.

A. sent a promissory note by mail to B. for collection, who forwarded it by mail to C. with a request for C. to collect it, and wrote to A. what he had done, who then wrote to C. that he had received B.'s letter "saying he had forwarded the note to you for collection," and directed C. to "forward" the proceeds when collected. *Held*, that this letter warranted C. in believing that he was authorized to forward the proceeds of the note to A. by mail.

There is no rule of law that the United States postal service is a less safe or appropriate means of sending money than a private carrier or banker; but whether it is so in any particular case is a question of fact, depending on the amount to be sent, the proportionate expense of different modes of transmission, the time and distance intervening, the usage in similar cases, and all other circumstances of the transaction.

Contract on an account annexed for fifty-eight dollars collected from Charles H. Tower. The answer admitted the receipt of the money by the defendant; but alleged that he collected it as attorney of the plaintiff, to whom he sent it in pursuance of his directions.

At the trial in the superior court, before *Devens*, J., "it was not disputed that the defendant received the money under the following circumstances: The plaintiff, who lived at Pittsfield, inclosed and sent by mail a promissory note against Tower (payable to his own order and indorsed in blank) to George M. Stearns, an attorney-at-law at Chicopee, in a letter," as follows: "Pittsfield, July 16, 1866. George M. Stearns, Esq. Inclosed I send you a note against Charles H. Tower, a tinner in your place. Please collect and send me before August 1, if possible. Balance due, interest and all, a little over $60. Please let me hear from you in a day or two. Mr. Tower is in Holyoke." Stearns sent the letter and the note by mail to the defendant, who was an attorney-at-law in Holyoke; and asked the defendant to collect the note; and wrote to the plaintiff what he had done. The plaintiff then wrote to the defendant a letter from Pittsfield, under date of August 8, stating that the plaintiff had received a letter from Mr. Stearns, "saying he had forwarded a note to you for collection against Charles H. Tower;" directing the defendant to "deduct the expense of collection from the amount, (if Tower pays it promptly,) and forward me the bal-

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ance;" and inclosing the plaintiff's business card, on which was printed the street, and the number on the street, of the plaintiff's address in Pittsfield. "On August 16 the defendant collected fifty-eight dollars upon said note, in small bills, which he changed into large bills, and the same day inclosed said large bills, five in number, in a letter, and mailed the same at Holyoke, properly directed to the plaintiff at Pittsfield, as set forth on the card. The plaintiff never received said letter, although he made repeated inquiries therefor at the post-office as soon as he learned it had been sent by mail."

"The defendant introduced testimony of business men to facts tending to show that the mail was a reasonably safe, and was a proper, mode of transmission of money in sums of this amount and larger amounts; and contended that he was authorized by the plaintiff to send the money for him, and was only bound to exercise reasonable care and a sound and honest judgment in complying with the orders of his principal, and also that the jury would, if they so believed, be authorized to find that the post-office and mail was a reasonably safe and proper conveyance and mode of transmission of a sum of money of this amount. The judge ruled that the defendant was not authorized to send the money by mail; that there was no question in the case for a jury; that if all the matters relied on by the defendant were true they would constitute no defence, and directed a verdict for the plaintiff." The defendant alleged exceptions.

G. M. Stearns & E. W. Chapin, for the defendant.

H. Morris, for the plaintiff. It was the defendant's duty to give the plaintiff notice of the collection of the money and request instructions how to transmit it. If he undertook to transmit it without express instructions, he should have done so by draft or express, rather than by mail. *Gurney* v. *Howe*, 9 Gray, 404. *Crane* v. *Pratt*, 12 Gray, 348. On the pleadings, he contends only that he was authorized to send the money; not necessarily by mail. The previous dealing of the plaintiff with the defendant was by the plaintiff's mailed letter of August 8; but in that letter nothing valuable was inclosed. From the fact

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that the plaintiff sent the note by mail from Pittsfield to Stearns at Chicopee, it does not follow that the defendant was warranted in sending the money by mail from Holyoke to Pittsfield, the routes and consequently the risks not being the same.

Gray, J. The court is unanimously of opinion that the defendant is entitled to a new trial. In regard to the transmission of money by mail, there is a distinction between the relation of creditor and debtor and that of principal and agent. A debtor is bound to pay his creditor in person or his authorized agent, and does not fulfil his obligation by making all reasonable efforts to transmit to the creditor the amount of the debt; and therefore depositing in the post-office a letter containing the money and addressed to the creditor does not discharge the debt, unless, by the creditor's express direction or assent, the usual course of dealing between the parties, or other facts from which such direction or assent may be inferred, the creditor has authorized the money to be thus delivered to him. *Gurney* v. *Howe*, 9 Gray, 404. *Crane* v. *Pratt*, 12 Gray, 348. But an agent employed to collect a debt and remit the proceeds is bound only to use ordinary and reasonable skill and diligence, either in collecting the amount or in sending it to his principal, except so far as his discretion is limited by positive instructions. *Kingston* v. *Kincaid*, 1 Wash. C. C. 457. *Mechanics' Bank* v. *Merchants' Bank*, 6 Met. 26, 27. If indeed the principal directs his agent to send the money in a certain way or by a particular channel, transmitting it in a different mode is evidence of negligence. But there was no such direction in this case. The only letter from the plaintiff to the defendant used the same word, "forward," in instructing him what to do with the money collected, as in mentioning the transmission to him of the evidence of the claim, which had in fact been made through the mail; and warranted the defendant in believing that he was authorized to transmit the money in the same manner. *Morgan* v. *Richardson*, 13 Allen, 410. There is no rule of law that the post-office established by the government for the purpose of carrying letters is a less safe or appropriate means of forwarding money than a private carrier or banker. Whether it is so in any particular case is a question

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of fact, depending upon the amount to be sent, the proportionate expense of different modes of transmission, the time and distance intervening, the prevailing usage in similar cases, and other circumstances surrounding the transaction, all which are proper for the consideration of the jury.

Exceptions sustained.

William G. Bliss *vs.* William Ball.

Possession and occupation for more than twenty years of land bounding on a public way is presumptive evidence of title to the middle of the way, subject to the public easement.

Evidence that shade trees have been suffered to stand more than twenty years where they were planted in a public way raises a presumption that they were planted under lawful authority.

Only the mayor and aldermen or selectmen have authority to cause shade trees lawfully standing in a public way to be removed against the will of the person whose private property they are to be taken to be under the Gen. Sts. *c.* 46, § 6; and one who assumes, without such authority, to remove or destroy such trees, on the ground that they are a public nuisance, is liable in damages to such person.

In an action for destroying the plaintiff's shade trees, it is no ground of defence or mitigation of damages that they rendered the defendant's house damp and unhealthy.

Tort, with a count in the nature of trespass *quare clausum fregit*, for girdling four maple trees in the plaintiff's close.

At the trial in the superior court, before *Devens*, J., it appeared that the plaintiff's close was situated on the corner of Springfield and Howard Streets in Chicopee, and separated by a fence from the sidewalk on both streets; and that the trees which the defendant girdled were situated five feet outside of the fence and within the limits of Howard Street. The plaintiff offered no evidence of title other than possession for more than twenty years; and testified that he had never occupied beyond the fence, but planted the trees more than twenty years before, and had trimmed them occasionally.

"There was no evidence of the value of the trees, but only of the injury to the plaintiff's premises. The defendant asked the judge to instruct the jury that there was no evidence of title in the land where the trees were situated, and that the plaintiff

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could not recover under the count for breach of the plaintiff's close; but the judge ruled to the contrary.

"As bearing on the question of damages, the defendant offered to show that the trees were a public nuisance, by reason of their close standing, causing dampness and unhealthiness to the public; and were liable to be removed by the public authorities for that reason; but the judge excluded the testimony, the defendant not claiming to have cut the trees by any public authority. The defendant also offered to show that the trees by their shade made the defendant's house damp and unhealthy; but the judge excluded the testimony."

The jury found for the plaintiff in damages of $400; and the defendant alleged exceptions.

M. P. Knowlton, for the defendant.

H. Morris, for the plaintiff.

CHAPMAN, C. J. The plaintiff's occupation furnished presumptive evidence of title to the middle of the street, subject to the public easement. *Boston* v. *Richardson*, 13 Allen, 152, 153. *White* v. *Godfrey*, 97 Mass. 472. The trees therefore appeared to be on his land. He planted them there more than twenty years ago; and, as the selectmen have permitted them to remain, it must be presumed that they authorized him to plant them. If the defendant thought they were a nuisance to the public, he might have complained to the selectmen, pursuant to the Gen. Sts. *c.* 46, § 6; and it was for them to decide the question whether they should be removed. The defendant had no authority to remove them; nor were the jury authorized to decide the question whether they ought to remain.

The defendant offered to show that the trees, by their shade, made his house damp and unhealthy. But he did not offer to show that their branches overhung his land, or extended beyond the line of the plaintiff's land. As against adjoining proprietors, the owner of a lot may plant shade trees upon it, or cover it with a thick forest, and the injury done to them by the mere shade of the trees is *damnum absque injuriâ*. It is no violation of their rights. The evidence on this point was properly rejected. *Exceptions overruled.*

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Trustees of the Wesleyan Academy *vs.* Inhabitants of Wilbraham.

A farm, and the farming stock, owned by an institution incorporated within this Commonwealth for the education of youth, and by it worked solely to raise produce and do team work for a boarding-house kept by the institution to supply board to the students at its actual cost, is exempted from taxation, by the Gen. Sts. *c.* 11, § 5, *cl.* 3; and it is immaterial that one eighth part of the farm, which consists of waste and swampy land and connects other parts which are cultivated and with which it was bought, is suffered to lie unused.

Contract to recover the amount of a tax assessed by the assessors of the defendant town, in 1866, in part on two horses, four oxen and six cows, and in part on two barns and about a hundred and fifty acres of land, of the property of the plaintiffs, and by them paid under protest. Trial in the superior court, before *Devens*, J., who reserved the case for the determination of this court on the following report:

"It appeared in evidence that the plaintiffs were incorporated and authorized to hold property, by the Sts. of 1823, *c.* 80, and 1866, *c.* 106; and that they held property in 1866 amounting in all to about $150,000, and were at that time an educational institution situated in the town of Wilbraham, owning and occupying several buildings used exclusively for recitation-rooms, halls and lecture-rooms, together with a large boarding-house and dormitory, sufficient in size to furnish lodging-rooms for more than two hundred and fifty students, and tables for two hundred and eighty. The average attendance of students upon the school for the year 1866 was about three hundred and thirty, of boys and girls. The institution is located about two miles from Collins's depot, and ten miles from Springfield, in a sparsely inhabited town in which there are no public markets or stores for the sale of provisions in quantities.

"It was also in evidence that there were not accommodations for boarding the students in the town outside of the boarding-house; that, with their present facilities for boarding, together with such as could be procured elsewhere in the town, they were frequently obliged to turn away students, for want of board and

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rooms; and that, while they were without a boarding-house some years ago on account of its destruction by fire, their school was reduced to less than half its present number for want of board and rooms, and the plaintiffs proceeded to raise funds and make preparations to rebuild their boarding-house immediately after it was burned.

"It appeared that the institution was in 1866 the owner of about one hundred and ninety acres of land in all; from thirty to forty acres of which were used for a play-ground and a grove for the students, and the rest constituted a farm, consisting of mowing, pasturage and tillage. This farm was the land on which was assessed the tax in question. In 1866 it was cultivated by the institution for the purpose of keeping cows to furnish the boarding-house in part with milk, and of raising vegetables and other provisions to be used there for the support of the students. The cows, oxen and horses, on which the personal property tax was assessed, were kept on this farm; the cows for the purpose aforesaid, and the oxen and horses to do the work of the farm and draw provisions and other things for the use of the boarding-house.

"The evidence showed that, in addition to summer fruits and vegetables used from day to day in the boarding-house, and hay and grain fed to cattle and horses in their barns, there were raised upon said farm, in the year 1866, seventeen bushels of beans, fifty-two bushels of beets, sixty-four bushels of turnips, forty-one bushels of onions, five hundred and eighteen bushels of potatoes, two thousand one hundred and four pounds of pork, and nine thousand eight hundred and eighty-six quarts of milk; all of which were consumed by the students, teachers and domestics in the boarding-house, the testimony being that the only sale, for some years, from the products of the farm, was of one ton of very poor hay, which was sold solely because it was too poor to be advantageously used by them. It was also proved that these products constituted but a small proportion of what they were obliged to use of the same kinds, and were mainly held in reserve for times when the plaintiffs were unable to get such provisions without great inconvenience from other sources.

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"It further appeared that their lands outside of the pleasure grounds of the institution were kept and used for no other purpose than to supply their boarding-house as aforesaid, and cheapen the cost of education by reducing the cost of board, and allow students to some extent to reduce the expenses of their education by working upon the land in vacations, and nights and mornings and Saturdays of term-time, and receiving pay therefor. It was also in evidence that the students were charged in their term-bills for board by the week, separately from room rent and tuition. There was evidence tending to show that, by this arrangement for maintaining a boarding-house, the plaintiffs were able to furnish board to their students at a much cheaper rate than could otherwise be done, and that they made no profits for themselves or said institution from their farm or boarding-house, but furnished board to their students at cost price, giving them the benefit of the best arrangements they could make for supplying the table cheaply. It was proved that the farmers of Wilbraham raised upon their farms sufficient produce for the supply of said boarding-house, but that it could not be obtained regularly, as needed, except by a system of contracts with individual farmers, and then at prices somewhat higher than it would cost to the producers.

"It was further in evidence that there were from fifteen to twenty acres of waste land, which were swampy and brushy, upon the farm; but that this portion was on one side of the farm and connected the arable land, was bought with other portions of the farm which were valuable for cultivation, and was not used or kept for any purpose in itself, but simply as a part of the farm which they used as above described; and that the plaintiffs had offered to sell it if they could find a purchaser.

"Upon the foregoing facts, the court directed the jury to return a verdict for the plaintiffs for the sum of twelve dollars, the amount paid as a tax upon the personal property in question, and instructed them that the plaintiffs could not recover for the amount paid as tax upon their real estate; and accordingly a verdict was so entered, and the case reported for the supreme judicial court to enter such judgment as the facts call for."

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M. P. Knowlton, (*G. M. Stearns* with him,) for the plaintiffs.

H. Morris & C. A. Winchester, for the defendants. The academy was established "for the purpose of promoting religion and morality, and for the education of youth in such of the liberal arts and sciences as the trustees shall direct." St. 1823, *c.* 80. The personal property used by them for the legitimate objects of their incorporation, and real estate occupied by the academy or its officers as such, are alone exempt from taxation. Gen. Sts. *c.* 11, § 5, *cl.* 3. *Pierce* v. *Cambridge*, 2 Cush. 611.

A boarding-house is not a necessary or usual appendage to an academy; and a farm is not a necessary nor even a usual appendage to a boarding-house. This boarding-house was carried on as a separate branch of business; its expenses and receipts were kept separate from the directly educational expenses of the academy; and the farm and farming stock, if an appendage to anything, were so to the boarding-house only, not to the academy. They were not necessary to enable the academy to accomplish the legitimate objects of its creation, but only conveniences to "cheapen the cost of education by reducing the cost of board." The same argument which would exempt them from taxation would exempt also stages, steamboats and railroads, used to cheapen travel to and from the academy. But the statute must receive a reasonable construction.

The keeping of a boarding-house and carrying on of a farm by the plaintiffs was not authorized by their act of incorporation, and was a misuse of their property; and so not exempt. If they might keep a boarding-house, why not a publishing-house and a clothing shop, and indeed carry on all kinds of business which would serve to cheapen the means of getting an education? They were not chartered for any such purpose.

If any part of the personal property or real estate was taxable, the remedy for the excess is by application for an abatement; and so the action cannot be maintained. *Howe* v. *Boston*, 7 Cush. 273. *Middlesex Railroad Co.* v. *Charlestown*, 8 Allen, 333. Gen. Sts. *c.* 11, §§ 43–47.

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CHAPMAN, C. J. This action is founded upon the Gen. Sts. c. 11, § 5, which exempts certain property from taxation. The third clause exempts "the personal property of literary, benevolent, charitable and scientific institutions incorporated within this Commonwealth, and the real estate belonging to such institutions, occupied by them or their officers for the purposes for which they were incorporated." The academy of the plaintiffs is a literary and scientific institution duly incorporated, and the only questions that are raised in the case relate to the character of the property which the defendants have assessed.

In *Pierce* v. *Cambridge*, 2 Cush. 611, a construction was put upon a similar provision of the statute then existing. It was held that, although the plaintiff was a professor in Harvard College, yet a house belonging to the corporation was not exempt from taxation, while he held it under a lease from them, paying rent therefor. If he had occupied it without taking a lease or paying rent, the court say it would have been otherwise. It was held to be taxable, because the present estate was in the lessee and the corporation had only a reversionary interest.

In this case, the plaintiffs have not leased their land, but are themselves in possession of it. It consists of one hundred and fifty acres of land and two barns. They own and occupy about one hundred and ninety acres of land in all, and their school buildings and a large boarding-house are situated on it. These buildings, and about forty acres of land around them, which is used as a play ground and grove for students, are not taxed. The rest of the land, which is taxed, constitutes a farm, consisting of mowing, pasture and tillage grounds, and about twenty acres of waste land, which is swampy and brushy and was purchased as part of the farm. The farm is cultivated by the plaintiffs for the purpose of keeping cows to furnish the boarding-house in part with milk, and of raising vegetables and other provisions to be used there for the support of the students. The cows, oxen and horses, on which the personal tax was assessed, were kept on this farm; the cows for the purpose aforesaid, and the oxen and horses to do the work of the farm and to draw provisions and other things for the use of the boarding-house.

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It does not appear that any profit is made by the plaintiffs out of what is thus furnished to the boarders; but an account is kept, and the cost of the production is reckoned, and enters into the price of board. The object of the plaintiffs is, to furnish the students with cheap board; and this is one method of cheapening it, the whole benefit of the arrangement being allowed to them. So far as these students are concerned, it is a boarding-school, and in respect to board, as well as school-rooms, apparatus and tuition, the ultimate purpose is, to furnish cheap education.

If the boarding-house and farm had been rented to a boarding-house keeper, the case would have been like that above cited. It would be the same, if the plaintiffs carried on their farm and sold the produce at its market price for the use of the students, in order to make a profit as farmers or as dealers in milk and vegetables. But, as it is managed, the object not being to make a profit to the funds of the institution, but to benefit the students, it is as really used for the purpose for which the institution was incorporated as the buildings and school apparatus. The personal property is exempted by the statute. As to the waste land, it would be difficult to purchase a large farm which did not contain more or less of such land, and in this case the land does not appear to have been purchased for any distinct purpose, nor to be appropriated to any use whatever. The court are of opinion that the property is so occupied as to be within the exempting clause.

Judgment for the plaintiffs for the whole amount of the tax.

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Henry C. Smith *vs.* First National Bank in Westfield.

A verdict for a party bound by the nature of his action to maintain one proposition against another is necessarily wrong, if all the evidence on which it is rendered tends equally to support either proposition.

An action against a bank for the conversion or the loss by gross negligence of valuable articles deposited with it as a bailee without hire cannot be sustained on evidence from which the inference that the articles were stolen by servants of the bank, selected and continued in its employment without negligence, who in the proper course of business had access to them, is equally deducible with any other inference.

It is not negligence for a bank to intrust its cashier to select and hire and pay out of his salary all the clerks and other servants employed in the banking room; no negligence being shown in the selection of the cashier.

No exception lies to the refusal of the judge presiding at a trial to rule on the sufficiency of the evidence to sustain the action before testimony is closed on both sides.

Tort to recover the value of bonds of the United States for the payment in all of $1000, deposited with the defendants for safe keeping, and alleged in one count to have been lost through their negligence, and in another count to have been converted by them to their own use.

At the trial in the superior court, before *Brigham*, J., the plaintiff's evidence tended to show that the facts were substantially as follows: The defendants were an incorporated bank, having a banking room in Westfield, divided into two portions by a counter and a partition resting upon it, through an aperture in which partition the officers and clerks of the bank transacted business with its customers. The defendants' cashier was Henry Hooker, to whom they paid, as a salary, a sum out of which he paid the clerks and servants employed in the banking room, all of whom were hired by him. Prior to November 16, 1865, the plaintiff had United States bonds, to the amount of $300, inclosed in an unsealed envelope, which was deposited for safe keeping in a safe, called burglar-proof, in the defendants' vault in their banking room, and was kept on a shelf with from thirty to fifty similar envelopes, (some sealed, and others not so,) having similar contents. On that date an additional bond, for $500, bought by the defendants' cashier for the plaintiff at the plaintiff's request, was put by the cashier into the envelope, by the

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plaintiff's direction. In January 1866 the envelope containing all these bonds was produced, at the bank, by the request of the plaintiff, and coupons were cut from them. In February 1866 the plaintiff "procured at the defendants' said office, of a person acting as clerk of the defendants, two additional United States bonds, each for $100, which, by the plaintiff's direction, were deposited in said envelope with the other United States bonds described, said envelope having indorsed upon it the plaintiff's name, and figures or letters indicating its contents." "In May 1866 the plaintiff, accompanied by his brother, at the defendants' banking office aforesaid, asked of a person acting as clerk of the defendants for the envelope containing his United States bonds, for the purpose of taking coupons attached thereto, and thereupon said person brought out to the counter all the envelopes containing United States bonds which were kept as described in the defendants' vault, and searched among them for the plaintiff's envelope, but failed to find it, and so told the plaintiff;" and the plaintiff "never has discovered or obtained possession of said missing envelope or bonds."

Several months before May 1866 the number of envelopes, containing bonds, in the defendants' charge, had so increased that they procured a box to hold them; after which, the envelopes, instead of being laid loosely on the shelf in the safe, were kept in the box, which was placed on the shelf. Whenever any of the owners of the envelopes had occasion to inspect or use his property, all the envelopes together were brought out from the safe by the cashier or some one of his clerks, (in the box, after a box was procured,) and laid on the counter, at the left of the aperture, and not within reach of any person outside of the partition, and there were examined to find his particular envelope. (This was the course pursued on several occasions, in the instance of the plaintiff, between the time of his first deposit of bonds and the time of the discovery of the loss; and one of the defendants' former clerks, who left their service early in March 1866, after testifying to his knowledge of the plaintiff's having bonds to the amount of $1000 in the envelope before that time, testified further, on cross-examination, "that upon one or two

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occasions he brought out and delivered to the plaintiff, at his request, his package, but did not know what was put back in the package when the plaintiff examined it, and did not of his own knowledge know that there was any bond in it; that for aught he knew the plaintiff might have taken them out.") After the applicant had finished his examination or other use of his envelope and its contents, and restored it to the clerk, it, with the other envelopes, was usually then put back into the safe; but sometimes the envelopes were suffered to lie some little while before being put back, while entries were made on a book which lay upon the counter on the right of the aperture.

After the clerk had failed to find the plaintiff's envelope and bonds in May 1866, as above described, the plaintiff asked the cashier what was the meaning of their disappearance; and he, after fruitlessly searching for them in the vault, told the plaintiff that he thought they were mislaid, and asked the plaintiff to call the next day, and the next day informed the plaintiff that he had searched, with his wife, in the banking room, vault and safe, for the missing property, until midnight, but had not found it. Afterwards the plaintiff had an interview with the cashier and with the president of the bank, William G. Bates, at the office of the latter, where, in answer to an inquiry, the cashier said "that the plaintiff's envelope and bonds might have accidentally got into the waste basket, kept in the banking room, and have been burned with the waste paper deposited in said basket;" and thereupon "said Bates tapped on the floor with his foot, and said cashier stopped any further explanation. At the same interview, the cashier, when asked whether the envelope and bonds might not have been stolen, replied that he had perfect confidence in both of the boys employed in the banking room."

No evidence was offered by the plaintiff of any hire or consideration for the keeping of his bonds by the defendants, "unless such as might be justly inferred from his purchase of said bonds of the defendants, or in their banking office of said Hooker, or of persons there acting as the defendants' clerks."

The plaintiff also testified that he never requested letters to

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be written to Washington by the defendants' officers in relation to his lost bonds, nor ever asked if letters had been received from Washington in relation to them, or saw or read or heard the contents of any such letters.

When the plaintiff rested his case, the defendants asked the judge to rule that upon the facts in evidence the action could not be maintained. The judge declined to rule upon the legal effect of said facts, unless the defendants rested also upon those facts; but the defendants declined to rest their case without introducing further evidence.

The defendants then introduced evidence which tended to modify the plaintiff's evidence in the following particulars: That the cashier was suffered by the defendants to trade in United States bonds in their banking room on his private account; and of the bonds in the plaintiff's envelope all but the two for $100 each were sold by the cashier individually to the plaintiff, or procured by him individually for the plaintiff; but that those two he sold to the plaintiff out of a lot of $10,000 which belonged to the defendants and which he was authorized to sell in their behalf. That all the defendants' money was kept in the safe, except during business hours when it was kept on the counter or in drawers within the counter; that trunks and large packages, containing articles of value to a great amount, were kept in the vault outside of the safe; that the safe "had the most secure lock the defendants could procure," and the key was kept by the cashier; that only one of the defendants' directors entered the vault, and he only when left in charge of the business of the bank during the absence of the cashier; that the cashier "told the plaintiff, when he took the plaintiff's envelope, that it was taken at the plaintiff's risk;" and that the plaintiff saw and knew where and how his envelope and its contents were kept in the safe, and where and how they were placed and cared for when taken from the safe to the counter for any purpose of his own or of any owner of any of the other envelopes. That the place on the counter where the envelopes were laid when taken from the safe for examination, was three or four feet to the left of the aperture in the partition.

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"That the waste papers of the defendants were kept in a basket under the counter, at the feet of the defendant's teller or clerks as they stood usually, inside of the counter, in front of said aperture, and said waste basket was so placed under the money drawer, and with a shelf between it and the place where envelopes containing United States bonds were laid when taken from the safe temporarily, that any of said envelopes falling from said counter could not fall into said waste basket;" "that the contents of the waste basket, when not wanted for fuel, were put in a box in the cellar, and, before they were burned or put in said box, were carefully examined, one by one, to see if anything of value was among them; and that the cashier examined the waste papers of the defendants in the box in the cellar within two or three weeks after the discovery of the loss of the plaintiff's bonds." That the cashier, on one or two occasions, at the plaintiff's request, brought out and delivered to the plaintiff his envelope, and on these occasions did not examine it when he delivered it to the plaintiff nor when the plaintiff returned it. That a bond, of the same denomination and number as one of the two $100 bonds which the plaintiff bought in February 1866, had, since the date of the loss of the plaintiff's envelope and bonds, been deposited with the defendants by one Foster, a clergyman in Wilbraham, who did not buy it from the defendants. And finally that, at the interview in Bates's office, Bates did not interrupt any explanation of the cashier to the plaintiff, by tapping on the floor or by any other sign.

For the purpose of contradicting the plaintiff's testimony about letters to and from Washington concerning his bonds, and also to show that his bonds were not lost by means of the waste basket, but were stolen, the defendants further offered in evidence some letters purporting to be addressed to the cashier and to a member of congress, by officers of the treasury department of the government of the United States, which had relation to the lost bonds; and at the same time offered to show that these letters were either exhibited or read to the plaintiff; but the judge refused to admit them.

"When the evidence of the foregoing facts, on the part of the

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plaintiff and defendants, was in, (constituting all the evidence relied upon by either party at the trial,) the defendants requested the judge to rule that upon all the evidence the plaintiff could not maintain his action; but the judge refused so to rule.

"The defendants then requested him to rule that the fact that a waste basket was kept by them, into which the package of the plaintiff might have possibly fallen or been accidentally thrown, was not evidence of gross negligence, and would not render the defendants liable, provided the waste basket was kept by the defendants where their business required it to be kept, and its contents were examined with ordinary care when it was emptied.

"The judge refused to rule as thus requested, and submitted the case to the jury upon the following instructions: The defendants, having received and kept the property of the plaintiff exclusively for his benefit and without hire, are not responsible for its loss or destruction, unless caused by the gross carelessness or gross negligence of the defendant corporation or of its officers and servants; and with such officers and servants would be included the president, directors, cashier, and all the clerks employed in the bank, its vaults and safe, notwithstanding such clerks were employed and compensated by the cashier, out of his salary and on his personal account, as his assistants. There would be a loss by gross carelessness, for which the defendants would be responsible, if the plaintiff's property, while kept by and deposited with the defendants, was by gross carelessness of them or their officers or servants, mingled with property of the defendants or other persons, similar in appearance and character to the plaintiff's property, and disposed of by the defendants as their property, or delivered to such other persons as their property; also if, by gross carelessness of the defendants' officers and servants, the plaintiff's property was placed or suffered to be mingled with waste paper of the defendants, and with such waste paper was disposed of or destroyed as waste paper by the defendants or their servants; also if, by gross carelessness of the defendants, their officers or servants, the plaintiff's property was so exposed that persons not in the service of the defendants could and did steal it. But if the plaintiff's property, not hav-

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ing been deposited, kept or exposed with gross carelessness, was stolen by the defendants' officers or servants, employed in or about their bank, vault or safe, who availed themselves of the opportunities afforded them of access to the bank, vault and safe, by their employment and service, to steal said property, the defendants would not be responsible for the loss by such theft."

The jury found for the plaintiff; and the defendants alleged exceptions.

W. G. Bates & M. B. Whitney, for the defendants.

H. Morris & N. T. Leonard, for the plaintiff.

WELLS, J. This was a gratuitous bailment. The defendants are liable only for want of ordinary care. Upon the facts which appear, mere failure to return the bonds upon demand would not constitute a conversion. The loss of the bonds is sufficient reason for not returning them, unless the loss occurred by the fault of the defendants. The action is in tort, and the burden is upon the plaintiff throughout. In order to charge the defendants with the loss, he must show gross carelessness on the part of the bank in some respect affecting the safe custody of the bonds, or which occasioned their loss.

As the case stands, the evidence furnishes no proof of negligence, except that which results by inference from the fact of loss. But theft, by either of the several persons who had access to the vault and to the packages, is equally open to inference from the same facts. For a loss in that mode, it is settled that the bank would not be responsible. *Foster* v. *Essex Bank*, 17 Mass. 479. The evidence went far to show that the bank did use due care in all its arrangements for the safety of the securities deposited. They were kept in the same vault and safe with the securities of the bank, and the same persons had access to both. There was no evidence of negligence in the selection of cashier or his clerks, or in permitting them to be retained after notice of unfitness. On the other hand, the plaintiff's evidence entirely failed to exclude the possibility of loss by other means than negligence of the defendants. It left the case, therefore, to be decided by mere inference, without any facts to determine which of several inferences was correct. The presumption of

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innocence would be sufficient to protect the cashier and his clerks from the charge of theft; but that presumption will not avail to sustain the burden of proof in an action against the bank for negligence.

There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.

We can see no objection to the instructions which were given to the jury; or to the rulings in the trial of the case. The court could not be required to take the case from the jury at the close of the testimony for the plaintiff. *Wetherbee* v. *Potter*, *ante*, 359, 360, and cases there cited. The letters offered and excluded were not competent as affirmative proof upon the question of the mode of loss of the bonds; and they did not tend to contradict the plaintiff in either of the particulars stated in the offer. We do not think the court was bound to give instructions in regard to the waste-paper basket, with the minute particularity of the defendants' prayer. The instructions given were sufficient.

But the court are of opinion that the whole testimony did not furnish such evidence as would warrant a jury in finding that there was gross negligence on the part of the bank, and that the loss of the bonds resulted from such negligence. *Giblin* v. *McMullen*, Law Rep. 2 P. C. 317. The exceptions must therefore be sustained upon that ground, and a

New trial granted.

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ALFRED M. COPELAND *vs.* MILO A. TAYLOR.

On the question of the amount of the property of a trader at a certain time, and to contradict his testimony which tended to show that it was then a certain sum, evidence is admissible of his declarations that at a former time it was a materially different sum, he having also testified that between the two times there was no particular change in his stock and he met with no serious loss.

Offers of a person to others interested in a claim against him, at interviews held with them "in relation to an adjustment" or "with a view to a settlement," to "leave out the matter in dispute," or to communicate information concerning the claim on condition that it should not be used against him in a lawsuit, are inadmissible in evidence in a suit on the claim.

TORT, on the Gen. Sts. *c.* 118, § 91, by the assignee of Sumner Babcock, an insolvent debtor, for the conversion of six hundred corsets and seven hundred petticoats, alleged to have been conveyed by Babcock to the defendant within six months before the filing of the petition in insolvency, and received by the latter with reasonable cause to believe that Babcock was insolvent. At the trial in the superior court, before *Brigham*, J., the jury found for the plaintiff; and the defendant alleged exceptions, of which the following are the material parts:

"Babcock was a witness, and testified that he paid in cash to various creditors, within six months of September 27, 1864, which was the date of the commencement of the proceedings in insolvency, about $6000; that from September 1863 until the time of his failure there was no particular change in his stock; that he was carrying a stock of from $2000 to $4000, and met with no serious loss. It also appeared that said Babcock's property was appraised at the value of $650, by the appraisal in insolvency. In rebuttal of Babcock's testimony, and for the purpose of showing that Babcock had not accounted for his property, a witness was called who testified, under the objection of the defendant, that in September 1863 he had a conversation with Babcock as follows: 'He said he came to buy goods; that he was worth $10,000 and owed nobody a dollar.' Said witness further testified that he could not say whether Babcock said he was worth $10,000, or had a stock of goods of $10,000."

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"The court, against the objection of the defendant, permitted Absalom Meade, a creditor of Babcock, to testify that after the insolvency of Babcock he went to Chicopee and saw the defendant with a view to a settlement of the claims of the assignee against the defendant, and the defendant took him into a room alone and said he 'thought this matter ought to be fixed up without a lawsuit;' that the witness answered, 'We claim we have been swindled, and that we did not get the full amount of goods of Babcock;' and the defendant replied: 'I am willing to tell you my whole connection with the matters, if you will not use it against me in case of a lawsuit;' that the witness refused to agree to this, and the defendant then said that 'Babcock was away, and when he returned he would use his influence with him to have the thing settled up, and would not say but he would lend Babcock the money to settle this claim.' The objection of the defendant was, that the above conversation was privileged. The plaintiff also testified, under like objection, that he made an appointment with the defendant to meet him at his office in relation to an adjustment of this matter, and his claim as assignee; that the defendant came to his office, and he told the defendant what the creditors had been informed as to the conveyance of Babcock's property to him, and that 'we had met to see what could be done and with a view to have it arranged,' and substantially the same words were spoken by the defendant then as in the conversation testified of by Meade; and the defendant offered to leave out the matter in dispute, which the plaintiff declined to do; also that at another time thereafter he met the defendant in the depot, and he expressed himself anxious to have the matter settled, and said he would explain the information received by the plaintiff and Babcock's creditors, if he would agree not to use the conversation against him in case of lawsuit."

G. M. Stearns, for the defendant.

N. A. Leonard, for the plaintiff.

Hoar, J. But two of the questions raised by the bill of exceptions were presented by counsel for the defendant at the argument, the other being waived.

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1. The evidence of admissions by the insolvent debtor of the amount of his property in 1863 was admissible, for the purpose of contradicting his testimony as to his pecuniary condition in 1864. He had testified that from 1863 to 1864 there had been no particular change in his stock, and that he had suffered no serious loss. The amount of his property in 1863 would therefore have some tendency to prove what it was in 1864, and to contradict the statement that it was of much less value than he had admitted at the earlier date.

2. The admission of the testimony of Meade and of the plaintiff was not so free from exception. The parties met, upon the plaintiff's invitation, "with a view to a settlement of his claims against the defendant." That at this meeting the defendant "offered to leave out the matter in dispute" should not, we think, have been allowed to be given in evidence to the defendant's prejudice, and against his objection. It was a mere offer of a mode of adjustment, which he had a right to make; and all the reasons which render an offer to compromise inadmissible in evidence apply to it. The jury may have inferred from the offer that he was conscious that his title was questionable. So the offer to communicate information, if the plaintiff would agree not to use it against him in case of a lawsuit, is a privileged communication. "It is the condition, tacit or express, that no advantage shall be taken of the admission, it being made with a view to and in furtherance of an amicable adjustment, that operates to exclude it." 1 Greenl. Ev. § 192. If any fact stated for such a purpose and under such a reservation would be inadmissible in evidence, the offer to communicate facts must be equally so, and for the like reason.

Exceptions sustained.

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JANE L. ALDEN *vs.* DWIGHT M. STEBBINS, administrator.

The receipt by an administrator of the proceeds of real estate included in his inventory, sold by leave of the probate court to pay debts and charges more than two years after the time of his giving bond; and of rents accruing on the real estate up to the time of the sale; is not a receipt of new assets on account of which he is liable to an action by a creditor of his intestate, which is otherwise barred by the Gen. Sts. c. 97, § 5.

CONTRACT, commenced April 9, 1867, on an account for wages due from the defendant's intestate, Ruby Carter, in his lifetime, and money paid for said Ruby's funeral expenses; submitted to the determination of the full court on agreed facts, of which the following are all that are material.

Carter died March 28, 1864. The defendant was appointed administrator September 27, 1864; gave bond and took his letters of administration on October 15 next following; gave due notice of his appointment and made return thereof within one year afterwards; included the real estate of the intestate in his inventory; filed an account in December 1866, showing a balance of personal assets in his hands; obtained leave of the probate court in January 1867 to sell the real estate to pay debts and charges; sold the same and received the proceeds; and received also fifty dollars for rents of the real estate before the time of the sale. The plaintiff made claim on him in September 1866 for the payment of the account in suit; which claim he refused.

The defendant contended that (the action not having been commenced within two years from the time of his giving bond) the special statute of limitation of suits against executors and administrators, Gen. Sts. *c.* 97, § 5, was a bar to the action; and the plaintiff contended that the proceeds of the sale and the rents were new assets, within the meaning of § 6, on account of which the defendant was liable.

J. H. Blair, for the plaintiff.

J. G. Allen, for the defendant, was not called upon.

WELLS, J. The case of *Chenery* v. *Webster*, 8 Allen, 76, is decisive against this action. The real estate in question was

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inventoried, and, by statute, was assets for the payment of debts, to be converted and applied in the mode which the statute prescribes. If the plaintiff had sued her demand within the two years limited for that purpose, the defence of *plene administravit* could not have been maintained. *Hildreth* v. *Marshall*, 7 Gray, 167.

The fifty dollars received for rent after the two years had expired does not appear to be "assets" at all, but to belong to the heirs; and so must the real estate also, unless there was some fact to authorize the sale, which does not appear in this statement. But the plaintiff's right to recover does not depend upon the validity or invalidity of the sale. She is barred by the statute; and, if she can have any remedy, it must be under the St. of 1861, *c.* 174. *Judgment affirmed.*

JEROME W. BELL *vs.* HENRY SMITH & another.

The usage of a trader to withhold from his agents authority to sell goods on credit is immaterial, and so inadmissible, on the question whether he specially conferred such authority upon an agent who admits that it was not contained in his original contract of agency.

In an action by an agent against his principals for wages for services rendered under a contract terminated by them, evidence that, on terminating it, they credited him on their ledger for the full amount of his stipulated wages up to that time, is competent to prove that they waived any claim to a forfeiture thereof; although the entry on the ledger was made without his knowledge.

CONTRACT against traders in tin ware, for wages as a peddler of the same. The defendants declared in set-off on an account with items for "goods trusted out" by the plaintiff. Trial in the superior court, before *Brigham*, J., who allowed the following bill of exceptions:

"The action had been referred to an auditor, who reported a sum as due to the plaintiff, and disallowed the defendants' set-off. The plaintiff offered in evidence the auditor's report, and rested his case. The defendants then offered evidence tending to show that the plaintiff performed the labor under a written contract dated September 14, 1866, by which he engaged to

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peddle for them one year for $600, and that on May 2, 1867, being directed by the defendants to take his wagon, furnished to him by the defendants, and go out and collect pay for goods which he had trusted out, refused to do so, and several times repeated his refusal when inquired of by the defendants whether they should understand that he refused to perform this duty, and then surrendered to the defendants the keys of the wagon and the key of the barn where the wagon was kept. It further appeared that on the day following, and for several successive days, the plaintiff tendered himself to the defendants to go out and collect his accounts, but the defendants refused to employ him further, insisting that he had left their service as before stated.

"For the purpose of proving their account in set-off, the defendants showed that they employed usually about thirty peddlers; that it was a rule of their establishment, well understood by all their peddlers, that peddlers should not trust out the goods committed to them for sale, unless upon their own responsibility; and that, in conformity with this rule, their peddlers held themselves accountable for goods trusted out by them. The court, however, rejected all evidence of such a rule, and of the usage and conduct of the defendants' peddlers, other than the plaintiff, under it; but permitted the defendants to show what directions they gave to the plaintiff individually on the subject. There was evidence tending to show that, subsequently to the hiring of the plaintiff and directions then given, the defendants specially authorized the plaintiff to trust out goods on their responsibility; and the plaintiff admitted that he was not authorized to trust out goods at risk of the defendants, unless the jury should find he was so authorized specially by said subsequent arrangements. There was also evidence tending to show that no such special authority was given; and this was one of the controverted questions of the case.

"It appeared that, on the ledger of the defendants, produced by them, the plaintiff was credited under date of May 2, 1867, with 'labor to May 2, $369.23.' It was testified that said credit was made on the books, by direction of the defendants, after the labor had ceased and the contract had been broken, if

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broken at all. The court ruled that, if the jury believed this entry was made by the defendants with full knowledge that the contract had been broken and the plaintiff's claim for labor forfeited, and with the intention to give the benefit of said wages to the plaintiff, they would be authorized to find from said entry a waiver of said breach of the contract. There was no other evidence of a waiver except said entry.

"The jury found for the plaintiff; and the defendants alleged exceptions to the rejection of evidence and the ruling of the court, as aforesaid."

H. Morris, for the defendants.

G. M. Stearns, for the plaintiff.

CHAPMAN, C. J. The plaintiff having admitted at the trial that he was not authorized to trust out goods at the risk of the defendants under his original contract with them, and that he relied wholly upon a special authority given to him at a subsequent time, the usage of the defendants respecting their contracts for hiring peddlers was immaterial. No proof of usage in making contracts with others could strengthen the admitted fact, that in their original contract with the plaintiff they withheld the authority from him. And the usage did not apply to the special contract which he attempted to prove was made afterwards.

If the plaintiff wrongfully refused to perform his written contract to peddle for the defendants for a stipulated time, he thereby gave to the defendants the right to terminate the contract. It appears that they did this on the 2d of May 1867, and on the same day credited the plaintiff on their ledger with his labor up to that time. Giving this credit was an act of the defendants tending to show that they waived any claim they might have to a forfeiture of his wages for past services. It was not a mere mental act, but an entry that changed the actual state of their account with him. Though they did not make the act known to him at the time, yet they did so afterwards, when they brought the book into court and used it at the trial. The court ruled correctly, that it was competent evidence to prove a waiver of the forfeiture on their part. *Exceptions overruled.*

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William H. Harrison & another *vs.* William S. Bailey & others.

In an action by an indorsee against the indorser on a promissory note, evidence of a waiver of demand and notice is sufficient to support an allegation in the declaration of demand and notice.

In an action by an indorsee against the indorser on a promissory note, evidence that after the note fell due the defendant promised the plaintiff to pay it is admissible with other evidence as tending to show a waiver of demand and notice.

Contract on a promissory note dated September 1, 1866, made by Hannah Post and Levi Post, payable on January 1, 1867, to the order of the defendant Bailey, and by him indorsed to the plaintiffs. The declaration alleged the failure of the makers to pay the note at maturity; and that due notice of its nonpayment was given to Bailey.

At the trial in the superior court, before *Devens*, J., the jury found for the plaintiffs; and Bailey alleged exceptions, of which the following is the material part: "The only question in the case arose concerning Bailey's liability. No evidence was offered to show actual demand and notice. The plaintiff relied wholly upon a waiver of demand and notice by Bailey; and offered evidence tending to show a waiver by Bailey upon the day the note matured. The defendant objected that evidence of a waiver by Bailey could not be given under this declaration; but the court admitted the same. The plaintiff also offered evidence tending to show a waiver of demand and notice, by Bailey, after the maturity of said note; which was admitted against the objection of the defendants. A portion of the evidence offered to show a waiver after maturity was testimony that Bailey, with knowledge that he was discharged, promised to pay said note the next week if no further cost was made until said next week; and that the plaintiff agreed thereto, and did not make further cost until the time agreed. The defendant objected to evidence of a promise to pay the note after maturity, under the declaration, as it was evidence of a new promise; the court admitted the same, not as testimony tending to prove a new promise, but as evidence tending to show a waiver."

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H. Morris & H. Fuller, for Bailey.

G. M. Stearns & N. T. Leonard, for the plaintiffs, were not called upon.

Hoar, J. It has been settled by a series of decisions, in this Commonwealth, that, in an action by the indorsee against the indorser of a promissory note, evidence of a waiver of demand and notice is sufficient to support an averment in the declaration of demand and notice. The case most expressly to the point is *Taunton Bank* v. *Richardson*, 5 Pick. 436, 444; but the doctrine is supported by *Jones* v. *Fales*, 4 Mass. 245; *City Bank* v. *Cutter*, 3 Pick. 414; *North Bank* v. *Abbot*, 13 Pick. 465; *Kent* v. *Warner*, 12 Allen, 561. Professor Greenleaf refers to the practice in these terms: "When matter in excuse of the want of demand and notice is relied upon, it is usual to declare as if there had been due presentment and notice, some latitude in the mode of proof being allowed, and the evidence being regarded not strictly as matter in excuse, but as proof of a qualified presentment and demand, or of acts which, in their legal effect, and by the custom of merchants, are equivalent thereto." 2 Greenl. Ev. § 197. See also 2 Stark. Ev. (4th Am. ed.) 274, note 1; *Norton* v. *Lewis*, 2 Conn. 478; *Williams* v. *Matthews*, 3 Cowen, 252. So an express promise of the indorser to pay the note, with full knowledge that no regular demand and notice have been made and given, is evidence of a waiver. 2 Greenl. Ev. § 190. *Martin* v. *Ingersoll*, 8 Pick. 1. *Creamer* v. *Perry*, 17 Pick. 332. There was evidence tending to show a waiver on the day the note became due; and evidence that the defendant afterward promised to pay it was certainly corroborative evidence to the same effect. As it was admitted only as evidence of waiver, it is unnecessary to consider what validity it would have had as a new promise; or whether it would have been insufficient to sustain the action from want of consideration, or under the statute of frauds.

The provisions of the Gen. Sts. *c.* 129, do not affect the sufficiency of the declaration. By § 2 it is required that "the substantive facts necessary to constitute the cause of action be stated with substantial certainty." They are so stated. But

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the law allows certain evidence to be given in support of the allegation of a demand and notice, and the rules of evidence are not altered by the new practice, except so far as special provision is made therein. § 81. *Exceptions overruled.*

GEORGE HASTINGS, executor, *vs.* MARY C. RIDER.

On the issue whether an instrument offered for probate as a will was executed when the testator was of sound and disposing mind, the opinions of physicians who attended him professionally during a sickness in which he executed it are admissible in evidence, as to his mental capacity to make a will immediately before and after its actual execution, accompanied by statements of the symptoms and appearances on which such opinions were based; although they were not family physicians of the testator. nor had made special study of mental disease.

On the issue whether a testator was of sound and disposing mind at the time of executing a will between seven and eight o'clock on the morning of the day of his death from cholera, with which he had been sick for three days, *Held*, that the opinion of a physician who was called to attend him professionally at three o'clock on the previous afternoon, remained with him till four o'clock in the morning, and returned to him at eight o'clock, as to his mental capacity to make a will at the two hours last named; and also the opinion of another physician who was called to attend him professionally at eleven o'clock on that morning, as to his mental capacity to make a will at that hour; were admissible in evidence, accompanied by their statements of the symptoms and appearances upon which such opinions were founded; although neither witness was the family physician of the testator or had made special study of mental disease.

APPEAL by the daughter and sole heir at law of Adam C. Rider, late of Springfield, from the allowance by the judge of probate of an instrument as his last will, the execution of which the appellant contended was procured by undue influence and while the testator was not of sound and disposing mind.

At the trial, before the chief justice, of issues framed on each allegation, the jury found on both against the will; and questions of law were raised by the executor, which the chief justice reported for the revision of the full court, by whose decision so much of the report as related to the issue of undue influence has become immaterial, the remainder of the report being in substance as follows:

It was admitted that the testator was of sound mind when

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in health, and the only cause from which it was contended that his mind had become unsound at the time of his execution of the will between seven and eight o'clock on the morning of Saturday, August 3, 1867, was the sickness from which he died late in the afternoon of that day. The evidence tended to show that on the evening of Wednesday, July 31, he was attacked by vomiting and other symptoms of cholera; that on Thursday evening Dr. Jacobs, a physician, was summoned and found him "in a state of collapse, in great distress and much prostrated, the blood having settled in some places, and with the rice-water discharges peculiar to cholera;" that he continued to grow worse until on Friday about three o'clock in the afternoon (Dr. Jacobs not coming to attend to him as had been expected) Dr. Allen, another physician, was sent for, and came immediately, remained with him until a short time after four o'clock on Saturday morning, returned to him at eight o'clock, and had charge of him until he died, a third physician, Dr. Collins, being however called for consultation about eleven o'clock on Saturday forenoon.

Dr. Allen testified that the disease appeared to be cholera, which was a disease with which he was acquainted; that he found the patient on Friday afternoon in a state of collapse, with severe diarrhœa, in extreme prostration, his skin cold and clammy, and the pulse almost imperceptible; that he grew weaker, and it was difficult to get his attention; that "he was sometimes wandering, but not delirious," and his voice was weak and at times almost inaudible; that "about midnight the symptoms were a little mitigated, and were so till after four o'clock," when the witness went away; that on returning at eight o'clock he found the patient "more sunken and reduced, and his pulse seemed to be entirely gone." On cross-examination concerning the period of his attendance during the night, the witness said: "There was a partial delirium or wandering. I don't think he knew, half the night, what he was about."

The appellant then asked Dr. Allen the following question: "At the time you left Rider, about four o'clock in the morning, had he, in your opinion as a physician, sufficient mental power

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to comprehend matters of business, such as his relation to property and the proper mode of disposing of the same by will?" This question was objected to "on the ground that the witness had no special skill in the management and care of insane persons, and had not been the family physician of the testator." It was conceded that he had no special skill beyond that of an ordinary physician of learning and experience in the treatment of diseases in general; and also that he had never acted as the physician of the testator before. But he was permitted to answer the question, and said: "I think he had not." The same question was repeated in application to eight o'clock, the time when the witness next saw the deceased; and he was permitted to answer it, notwithstanding like objection, and said: "At that time there had been a change for the worse."

Dr. Collins testified that, when he was called in consultation about eleven o'clock, he found the patient "in a dying condition," with a clammy sweat, labored breathing, and imperfect circulation; that the case was then hopeless. He was then asked the same question in relation to that time, which had been asked of Dr. Allen in relation to the preceding hours. The same objection was made; but the inquiry was allowed, although "it was conceded that the witness had no skill or experience in the treatment of insane persons, beyond that of Dr. Allen;" and he replied that "Rider was not at that time in a condition to transact any business."

G. M. Stearns, for the executor.

H. Morris, for the appellant.

Gray, J. The rules which must govern this case are so well settled in this Commonwealth by judicial decision, that it is unnecessary to consider the numerous and conflicting adjudications in other states.

The subscribing witnesses to a will may testify to their opinion of the testator's sanity, upon its being presented for probate, because that is one of the facts necessary to the validity of the will, which the law places them around the testator to attest and testify to. But other witnesses, having no peculiar skill or professional experience, can testify only to facts within their own

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knowledge, from which the condition of mind may be inferred, and are not permitted to state whether in their opinion, though derived from personal observation, a certain person was sane or insane at a particular time. *Poole* v. *Richardson*, 3 Mass. 330. *Buckminster* v. *Perry*, 4 Mass. 593. *Needham* v. *Ide*, 5 Pick. 510. *Commonwealth* v. *Wilson*, 1 Gray, 339. *Hubbell* v. *Bissell*, 2 Allen, 200. *Commonwealth* v. *Fairbanks*, Ib. 511. *Townsend* v. *Pepperell*, *ante*, 40. The reasons upon which these statements are excluded are, that they are not of facts, but opinions, of those having no peculiar duty or capacity to form them, upon a matter requiring special knowledge and skill to judge of intelligently, as to which every unskilled witness has a different standard, and which can be quite as well understood by the court or jury from proof of the details of the acts and conduct of the person whose mental capacity is in question. Evidence in probate cases in this Commonwealth is regulated by the common law, which has not adopted the looser practice, derived from the civil law, of the English ecclesiastical courts upon this subject. *Eveleth* v. *Eveleth*, 15 Mass. 307. *Wright* v. *Tatham*, 5 Cl. & Fin. 670.

An attending physician stands upon a different ground. It is his duty to make himself acquainted with the peculiarities, bodily and mental, of a person who is the subject of his care and advice; and he has the experience which results from the performance of the same duty in other cases. He is therefore permitted to testify from his own observation to his opinion of his patient's mental capacity to make a will, in connection with the facts upon which that opinion is founded.

In the leading case of *Hathorn* v. *King*, 8 Mass. 371, which was argued by the ablest counsel before Justices Sedgwick, Sewall and Parker, the parties contesting the probate of a will asked the attending physicians of the testatrix "Whether in their opinion, at the time of executing the will, the deceased was of sound and disposing mind and memory." It was objected that the question of sanity must be determined by the conversation and actions of the party; that these were the only standard; and that the examination proposed would put the physicians in the place of the jury. But the court held the

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question competent, saying: "The physicians may be inquired of, whether from the circumstances of the patient, and the symptoms they observed, they are capable of forming an opinion of the soundness of her mind, and if so, whether they from thence conclude that her mind was sound or unsound; and, in either case, they must state the circumstances or symptoms from which they draw their conclusions." In *Dickinson* v. *Barber*, 9 Mass. 225, the depositions of physicians to their opinion that a person was insane were rejected solely because the facts on which the opinion was based were not testified to.

In *Baxter* v. *Abbott*, 7 Gray, 71, a case fully discussed by the counsel and the court, it was adjudged that a physician who had practised many years in the neighborhood of the testator, and had been at times his medical adviser, might be asked whether in his opinion he was sane or insane during three or four months preceding the execution of the will; although it appeared that the witness had never had charge of insane persons, except such cases as ordinarily occur in medical practice, and that he uniformly advised that patients in whom insanity appeared to be developed should be sent to an asylum. The statement in the *per curiam* opinion in 2 Allen, 511, that this decision was not unanimous is an inadvertence; for the opinion of the court shows that the only division was upon a wholly different question. See 7 Gray, 83.

In *Commonwealth* v. *Rich*, 14 Gray, 335, upon a trial for murder, a physician who had not made the subject of mental disease a special study was allowed, without objection, to testify to his opinion of the defendant's mental condition from personal observation; and was only restrained from giving an opinion as to his sanity or insanity upon a hypothetical case stated as arising out of the other testimony, and from stating whether from what he knew of the defendant's mental powers he would in his opinion be competent to apply the rules of right and wrong to any state of circumstances concerning which he was under high excitement or the influence of an uncontrollable impulse, because neither of these inquiries related to matters within his own observation, or as to which he had shown himself to be qualified to testify as an expert.

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In the case at bar, both of the physicians examined as witnesses had professionally attended the testator on his death-bed, and were rightly permitted to testify to their opinion of his mental capacity immediately before and after the execution of his will, accompanied by the symptoms and appearances upon which that opinion was formed. The short time during which they had any knowledge of the patient might affect the weight, but not the competency, of their testimony.

The verdict of the jury, finding that the testator was not of sound mind at the time of executing the instrument offered for probate, must therefore be affirmed, and a decree entered accordingly; and it is unnecessary to consider the correctness of the rulings and instructions upon the issue of undue influence.

Decree of judge of probate reversed.

William Patton & others *vs.* City of Springfield.

A sewer built between Garden Brook and the Connecticut River in Springfield, under the authority of the St. of 1863, *c.* 107, § 1, "for the purpose of protecting private property and the streets of the city from damage by water during seasons of freshet," and under § 6 "to be used, controlled, maintained and repaired in the same manner as drains constructed wholly at the expense of the city," is not necessarily restricted from uses for which the city may receive pay from persons entering it with their private drains.

A jury impannelled under the St. of 1863, *c.* 107, § 3, to revise a determination of the city council of Springfield, under § 2, of the division, between the city and the owners of benefited land, of the cost of building a sewer between Garden Brook and the Connecticut River under that statute, may in such revision take into consideration whether the city derives or has means to derive any revenue from the use of the sewer by persons who may pay for draining directly into it from land through which it passes, but which is not included in the district for the benefit of which it is built and on which its cost is in part assessed; and, if it is so located and built as to take and carry off sewage brought to it by other sewers or drains already built or likely to be required to drain lands situated beyond or higher upon Garden Brook, they may also take into consideration the interest of the city in such other sewers and drains.

On the revision by a jury, impanelled on the petition of persons who alleged that their land was not benefited, of a determination of the city council of Springfield under the St. of 1863, *c.* 107, § 2, of the extent of land benefited by the building of a sewer under that statute, and of the division of the cost of the sewer between the city and the landowners, the presiding officer refused the request of the city to instruct the jury that they "were

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not to determine whether or not the amount of benefit was equal to the probable cost to the petitioners, but only whether or not the premises included were benefited." *Held*, that this refusal was erroneous, although he did instruct them that the objection that the land of the petitioners was not benefited should be sustained unless they should find that it might receive some appreciable or substantial benefit from the sewer.

After the acceptance by the superior court of the verdict of a jury impanelled under the St. of 1863, c. 107, to revise a determination of the city council of Springfield of the extent of land benefited by the building of a sewer under that statute, and of the division of the cost of the sewer between the city and the landowners, an appeal lies to this court on questions of law appearing from the record of their proceedings; and if, on such an appeal, it appears that the findings of the jury were upon distinct and separate issues, in reference to part of which errors of law are manifest, a new trial should be ordered of such part only, and the acceptance of the verdict affirmed as to the residue.

PETITION on the St. of 1863, *c.* 107, § 3, for a jury to revise the determination of the city council of Springfield, under § 2, of the extent of territory benefited by the construction, under § 1, of a sewer from Garden Brook to the Connecticut River in that city, and of the division of the cost of the same between the city and the owners of real estate. The sheriff of Hampden presided at the trial, and made a report thereof to the superior court, in substance as follows:

"It appeared that the city, pursuant to the statute above named, had constructed a sewer from Garden Brook in Perry Street, through Cypress Street, to the Connecticut River, and that the city council had determined to pay one third of the expense of constructing the sewer, to wit, $4543.11, and to assess the balance, to wit, $9082.23, upon certain territory adjudged to be benefited by the sewer; and that the petitioners were each seised of lands lying in the limits of said territory. The petitioners objected that the city should pay more than one third of the expense; that their lands were not benefited; and that lands which were benefited were not included in the territory ordered to be assessed.

"The jury viewed the premises. Garden Brook flows northerly from the Boston and Albany Railroad, through the lands described. Before building the sewer, the brook had in freshets overflowed; to prevent which the city claimed to have built the sewer. It appeared that in 1849 the brook had been enlarged and the sides walled up, (under a commission appointed upon a petition for the improvement of the meadows through which

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it flowed,) at the expense of owners of the lands benefited thereby; and that the brook had subsequently become obstructed, and had been at different times cleared out by order of the mayor of the city. It was admitted, however, that the brook was not a city sewer, and it was not shown that the city was under any legal obligation to keep the brook clean. At the time of the hearing, the brook was much obstructed by earth and rubbish, and by the falling in of the arch built over the brook, at different points. The sewer runs westerly from the brook. The city subsequently built another sewer, east of the brook on Ferry Street. The last named sewer enters the brook about one foot above and south of the point where part of the water of the brook falls into the Cypress Street sewer; and water flowing from the Ferry Street sewer is carried off in the Cypress Street sewer, or flows northerly in the brook.

"The city clerk testified that several parties, whose lands were in the district ordered to be assessed, had each paid the city twenty-five dollars for entering the Ferry Street sewer, to which testimony the defendant objected. The jury were instructed that, in determining the objection that the city should pay more than one third of the expense, they might consider the revenue which the city might reasonably derive from the use of the Cypress Street sewer, by parties who might pay for draining directly into it, or into any other drains connected with it, which were or might be laid pursuant to the fifteenth section of the city charter; to which the defendant excepted. It was in evidence that the city had by ordinance accepted the Gen. Sts. *c.* 49, §§ 3–6; which ordinance was put into the case.

"The case was submitted to the jury upon the following instructions, which were not objected to by the respondents:

"1. Shall the objection that the city should pay more than one third of the expense be sustained? If the jury find, upon all the evidence in the case, that the city should rightfully pay more than one third of the expense of the sewer, this objection should be sustained; and, in determining the question, the jury are to consider the whole amount of land now included in the district to be assessed as properly liable to assessment, and will

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not consider the pecuniary circumstances of the owners of the lands to be assessed.

"2. Shall the objection of each petitioner that his lands are not benefited be sustained? Unless the jury find that the land of each petitioner may receive some appreciable or substantial benefit from the sewer, this objection must be sustained. The land of each petitioner should be considered separately.

"3. Shall the objection that lands not included in the order of assessment are benefited be sustained? If the jury find that there are lands not included in the assessment which are benefited by the sewer by its protecting them from the overflowing of the brook in freshets, then this objection must be sustained."

The jury were further instructed as follows: "That the burden of proof was upon the petitioners; that the jury are not to consider whether lands owned by others than the petitioners are improperly included in the district to be assessed, the petitioners being in no manner aggrieved thereby; that in case the taking of the water by the Cypress Street sewer lowers the level of the town brook in times of freshets so as to facilitate the draining of the lands of the petitioners by private or other drains into the town brook, or into other natural watercourses in the district, then the lands would receive such benefit as would render them liable to assessment; and the prevention or substantial diminution of the liability to the overflow of water in freshets is such a benefit as would render their lands liable to an assessment, without showing any other benefit from the sewer or damage to the land.

"The respondents asked for the following instructions; which were refused, and exception was taken to the refusal:

"1. The jury, in determining the amount which the city should pay, are not to take into consideration the possible revenue that may hereafter be received by the city for permitting parties to enter any sewer which the city may hereafter construct to connect with the Cypress Street sewer.

"2. The jury are not to determine whether or not the amount of benefit is equal to the probable cost to the petitioners, but

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only whether or not the premises included are benefited for the purposes of removing surplus water in times of freshets.

"3. The jury, in making the determinations, are not to consider whether or not the town brook, if cleared out, would take all the water that would naturally seek an outlet through it in times of freshet, but whether or not there is likely to be surplus water from the town brook which the sewer might benefit the land by taking off in times of freshet, in the present or any probable future state of the brook."

The jury returned a verdict that the city ought to pay more than one third of the expense of the sewer; that the lands of the petitioners were not benefited; and that there were no lands benefited not included in the order of the city council for the assessment of the cost of the sewer. This verdict was accepted by the superior court; and the respondents appealed.

G. Wells, (*N. A. Leonard* with him,) for the respondents.

J. M. Stebbins, for the petitioners.

WELLS, J. Upon the question of the proper division of the expense of constructing the Cypress Street sewer or drain, between the city and the owners of real estate within the territory supposed to be benefited thereby, the petitioners were allowed to show "that several parties, whose lands were in the district ordered to be assessed, had each paid the city twenty-five dollars for entering the Ferry Street sewer." The jury were also instructed that they might "consider the revenue which the city may reasonably derive from the use of the Cypress Street sewer, by parties who may pay for draining directly into it, or into other drains connected with it, which are or may be laid pursuant to the fifteenth section of the city charter." The Ferry Street sewer connects with the Cypress Street sewer by having its discharge into Garden Brook nearly opposite (about one foot above) the point where the Cypress Street sewer takes the water from the brook. The St. of 1863, *c.* 107, did not authorize the construction of drains east of the brook. The Ferry Street sewer must therefore have been constructed under the city ordinance referred to, or under the Gen. Sts. *c.* 48. We do not understand that the first of the instructions asked for and refused

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raises any question different from that which is raised by the instructions given, when applied to the consideration of connecting drains. Two questions are raised by the testimony admitted and instructions given to the jury: First, whether "revenue which the city may reasonably derive from the use of the Cypress Street sewer, by parties who may pay for draining directly into it," may properly be considered by the jury; and, Second, whether such revenue from parties draining into the Ferry Street or other connecting sewers may be considered.

Upon the first question, it is the opinion of the court that if the city derived or had means to derive any revenue from the use of the drain in the manner supposed, that would be properly a matter for consideration in determining what portion of the expense of the drain should be borne by the city. We are not prepared to decide that the authority to construct a drain under the St. of 1863, *c.* 107, is so exclusive of all other, that a city might not construct a drain in part under the authority and for the purposes defined in that act, and in part under the authority and for the purposes set forth in the Gen. Sts. *c.* 48. The division of the expense and the assessments upon parties benefited would be somewhat difficult and complicated, but we cannot say that it would be impracticable, or that the combination of the two purposes and plans in one drain or one system of drainage would be improper or unauthorized. But it is not necessary to decide that question in the present case. A drain constructed under the authority of the St. of 1863, *c.* 107, is not necessarily restricted from uses for which the city might receive pay from parties availing themselves of its advantages for the purpose of entering it with their private drains. In conducting the water from the territory or district for the benefit of which it is constructed and upon which its cost is to be in part assessed, the drain may pass through land not included in such district, but whose occupants may desire to enter it with their private drains, paying a reasonable compensation for the privilege. If by any such arrangements the city had means of indemnifying itself for a portion of the cost of the drain, we think that such a source of revenue should be taken into account in determining

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upon the division between the city and the owners of real estate who are to be assessed.

Upon the second question, somewhat similar considerations apply. If the Cypress Street sewer was so situated and so constructed as to answer for a trunk or main drain, to take and carry off water brought to it by other drains already constructed or likely to be required for the drainage of lands above or beyond Garden Brook, it would be reasonable that some portion of the cost of such main drain should be apportioned to the upper drains which depend upon it for their discharge. The city has an interest in such upper drains, and it may, under the Gen. Sts. *c.* 48, § 4, or by agreement, collect or receive compensation from landowners who enter it with their private drains, or are otherwise benefited; and the expense of their construction is lessened by the nearer outlet thus furnished for them. This relation of the upper to the lower or main drain, and the interest of the city in all its drains, especially in those constructed for other purposes and under other authority than the St. of 1863, *c.* 107, would warrant the jury in imposing upon the city a larger portion of the expense of the lower drain than would be imposed if the drains were not thus connected. Upon this ground and to this extent we think the testimony admitted and the instructions given in regard to the revenue from the Ferry Street sewer were proper.

The second instruction asked for and refused was clearly a proper one to have been given. The petitioners' counsel do not contend that it is not so; but suggest that it is included in the instructions that were actually given. The instruction given was, that the objection that the lands of the petitioners were not benefited should be sustained, "unless the jury find the land of each petitioner may receive some appreciable or substantial benefit from the sewer." This rule was sufficiently full, accurate and guarded in one direction. But in the other direction there might arise a doubt whether this appreciable or substantial benefit was not to be considered relatively, by comparison with the cost of the improvement. To guard against this misapplication of the instruction given it was proper that the instruction asked

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for should also be given; and we think the respondents were entitled to it.

The third instruction asked for and refused may have a double aspect. The feasibility of keeping the town brook, or Garden Brook, cleared out, so as to "take all the water that would naturally seek an outlet through it in times of freshet," might have a bearing upon the division of the cost of the Cypress Street sewer between the city and the landowners who had such other means of drainage through the brook. On the other hand, it would not sustain the objection of such landowners that their lands were improperly included in the territory subject to assessment, if there was "likely to be surplus water from the town brook which the sewer might benefit the land by taking off in times of freshet." The instruction should not have been given, unless with a limitation confining it to the question whether the lands of the petitioners were properly included in the district to be assessed. With such limitation, it might properly have been given; and we think the considerations above suggested in regard to the second instruction prayed for apply to this, though perhaps in a less degree.

A question is made that the respondents have no right of appeal to this court. The statute requires the proceedings to be conducted in the same manner as in case of highways. An appeal upon questions of law appearing from the record is clearly given. Gen. Sts. *c.* 114, § 10. *Lanesborough* v. *County Commissioners*, 22 Pick. 278.

From the foregoing considerations it results that the verdict of the jury upon the first objection, namely, that the city ought to pay more than one third of the expense of the sewer, is found upon proper evidence and under proper instructions, and therefore ought to stand. The jury are not required to determine what the proportion ought to be. The statute authorizes the city council to make a new apportionment.

Upon the objection that the lands of the petitioners are not benefited, and ought not to be included in the district to be assessed, the exceptions taken by the respondents are sustained. The question then arises, whether the verdict shall be set aside,

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and a new trial had of the whole case; or only as to that part in which there was error at the former trial. The issues tried, upon the several objections of the petitioners, are clearly distinct and separate, and in no manner dependent upon each other. The considerations involved and the testimony appropriate to each are unlike. There is no general verdict embracing the several findings in one result, and no final judgment of the court thereon; but the adjudication of the court upon the findings of the jury is merely to be certified by the clerk to the county commissioners. The authority over the verdict is given to the court in broad and general terms: "The court shall receive it and adjudicate thereon, and may set it aside for good cause." Gen. Sts. c. 43, § 40. *Fitchburg Railroad Co.* v. *Eastern Railroad Co.* 6 Allen, 98. In exercising the power to grant new trials, the court may impose such conditions and limitations as it shall deem reasonable and right. When the questions are so clearly separate and distinct as in this case, it certainly is reasonable that the new trial should be limited to that in which alone there has been error at the previous trial. *Kent* v. *Whitney*, 9 Allen, 62. No practical difficulty can result from such an acceptance in part. Upon application for a new jury, the warrant will specify the issues which remain to be determined, and the return and acceptance of a new verdict will complete the proceedings. The provisions of this act are somewhat peculiar, and we are aware of no practice which will furnish a guide in conducting such legal proceedings as it may require. The course here adopted is analogous to that pursued in cases relating to highways, where several parties are joined in one warrant. *Anthony* v. *County Commissioners*, 14 Pick. 189. *Lanesborough* v. *County Commissioners*, 22 Pick. 278. *Worcester* v. *Leicester*, 16 Pick. 39. The new trial should be limited to the single question whether the petitioners are properly included in the district to be assessed.

As to that question, the verdict is to be set aside; as to all other questions, its acceptance by the superior court is affirmed; and a certificate is to be transmitted accordingly.

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SUPPLEMENT.

A bill is not laid before the governor for his revisal, nor presented to the governor, within the meaning of the Constitution of Massachusetts, part 2, c. 1, § 1, art. 2, by being sent from the senate or house of representatives to the secretary of the Commonwealth; but must be laid before the governor personally.

On February 20, 1868, the following order was passed by the house of representatives, and on February 21 transmitted by the speaker, as therein provided, to the justices of the supreme judicial court, who on February 25 returned the reply which is annexed.

Whereas a bill entitled an act to repeal chapter two hundred and forty-nine of the acts of the year eighteen hundred and sixty-five, entitled an act to establish a state police, and the acts or parts of acts in addition or relating thereto, was passed through its several stages, and on the tenth day of February was sent by the senate to the governor; and

Whereas the governor had left the state of Massachusetts, so that the said bill could not be laid personally before him by the secretary of state, with whom all bills have been left for the last twenty years for presentation; and

Whereas the Constitution of Massachusetts provides under chapter two, section two, "whenever the chair of the governor shall be vacant, by reason of his death or absence from the Commonwealth or otherwise, the lieutenant-governor for the time being shall during such vacancy perform all the duties incumbent upon the governor, and shall have and exercise all the powers and authorities which by this Constitution the governor is vested with when personally present;" and

Whereas under chapter one, section one, of the Constitution it provides: "In order to prevent unnecessary delays, if any bill or resolve shall not be returned by the governor within five days

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after it shall have been presented, the same shall have the force of a law;" and

Whereas the governor having left the state and continued in such absence until the fourteenth day of February; and

Whereas on the nineteenth day of February he returned to the house of representatives the said act with his objections, when by the Constitution the said act may have become a law on the fifteenth day of February; therefore

Ordered that the speaker of this house be directed to transmit to the justices of the supreme judicial court a certified copy of the preamble to this order, and request their immediate opinion upon the facts stated therein, whether the bill aforesaid became and is a law of this Commonwealth.

The undersigned, justices of the supreme judicial court, have taken into consideration the inquiry submitted to them by an order of the house of representatives, passed on the 20th instant, and beg leave to submit the following reply thereto.

The Constitution provides in part 2, *c.* 1, § 1, art. 2, that no bill shall become a law, and have force as such, until it shall have been laid before the governor for his revisal; and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same; but if he have any objection to the passing of such bill, he shall return the same, together with his objections thereto in writing; and in order to prevent unnecessary delays, if any bill shall not be returned by the governor within five days after it shall have been presented, the same shall have the force of law.

As the duty of revisal by the governor is a personal duty, with which he alone is intrusted when his chair is not vacant, it is necessary that the bill should be laid before him personally. A bill is not laid before him or presented to him, within the meaning and intent of these provisions, by being sent from the senate to the secretary of the Commonwealth. The Constitution makes the secretary an independent officer, and prescribes his duties; and his possession of a bill sent by the senate to be presented to the governor is not the possession of the governor.

A bill must be laid before the governor, or the person who, for

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the time being, is clothed with the powers of governor under the Constitution, for his revision. The individual whose duty it is to sign the bill is entitled to have it before him, that he may have the opportunity to sign it or return it with his objections thereto to the branch of the legislature in which it originated. This bill does not appear to have been so presented to any one, except by the statement that it was returned unsigned on the 19th, with the governor's objections.

Upon the facts stated in the preamble, the bill referred to did not become and is not a law of this Commonwealth.

REUBEN A. CHAPMAN,
EBENEZER R. HOAR,
HORACE GRAY, JR.,
DWIGHT FOSTER,
JOHN WELLS,
JAMES D. COLT.

BOSTON, February 25th, 1868.

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INDEX.

ABATEMENT.

See APPEAL.

ACCOMPLICE.

1. On the trial of a criminal case, the judge, in charging the jury, recited evidence introduced by the Commonwealth to corroborate the testimony of an accomplice, and said that if the jury believed the witnesses there was such corroboration. *Held*, that the reasonable interpretation of this instruction was, not merely that the whole testimony of all the other witnesses, taken together, amounted to a corroboration of the accomplice, but that the testimony of each of them, taken by itself or with the aid of such other evidence only as was avowedly introduced in connection with it, was corroborative evidence. *Commonwealth* v. *Larrabee*, 413.

2. On the trial of an indictment for larceny, the principal witness for the Commonwealth was an accomplice in the theft, who testified that on the morning before committing it he walked some distance (in part on a railroad, where he met M.,) to meet the two defendants by appointment; that then they three drove with a horse and wagon to a village where the defendants left him to buy luncheon; that he walked after them, and found them waiting for him and talking with a man whom he had seen in court; that then they three drove on further, and called at two houses for water, which he obtained at one from a woman, and at the other from a girl, both of whom he saw a few days before the trial, when taken by an officer to see them; and that then they waited until night, when they committed the larceny. To corroborate him, the Commonwealth called a witness who testified that, at some time during the month of the larceny, he saw such a horse and wagon standing on the road in that village, with two men in the wagon, and had some talk with the men, such as was stated by the accomplice, during which a third man came with a lunch, of which the three partook. The witness professed himself unable to identify either of the three men; but the judge admitted his testimony in connection with that of a woman and her daughter, and of two girls, who lived in neighboring houses situated substantially as described by the accomplice, (but at a distance of several miles from the place described by the previous witness,) all of whom identified the accomplice and the defendants as having called at their houses with such a horse

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and wagon, and obtained water, the day preceding the larceny. The defendants, testifying in their own behalf, denied ever having seen the witness who met the three men on the highway, or either of the female witnesses, denied also the whole story of the accomplice, and said that on the day preceding the larceny he came to them, at a place different from that named by him, and borrowed their horse and wagon, about ten o'clock before noon, which was inconsistent with his statement of the time when he met M. on the railroad. The Commonwealth, thereupon, to contradict the defendants, and corroborate the accomplice, called M. as a witness, who testified that one day in one of two months (one of them being the month of the larceny) he met the accomplice at the place described by him on the railroad, at an hour which the witness thought was about the middle of the forenoon. *Held*, that the accomplice was corroborated by the testimony of each of the other witnesses called by the Commonwealth, taken by itself or with the aid of such other evidence as was avowedly introduced in connection with it. *Ib.*

See EXCEPTIONS, 3.

ACCORD AND SATISFACTION.

See COLLATERAL SECURITY, 2; INTOXICATING LIQUORS, 2–4; PAYMENT.

ACCOUNT ANNEXED.

See PLEADING, 2.

ACTION.

1. One who, to become a member of a corporation, signs a by-law which pledges members to be liable "in their individual as well as their collective capacity" for all moneys lent to it, is not thereby personally liable for money subsequently lent to the corporation, without other evidence that it was lent on the credit of the pledge in the by-law than that the preamble thereof sets forth that the design of the corporation is to afford to persons desirous of saving their money the means of employing it to advantage. *Flint* v. *Pierce*, 68.
2. The owner of a billiard table, who, under an executory contract for the sale of it to the keeper of a billiard room, leaves it in the possession of such keeper, has no right of action against a person who takes from it a removable cloth covering, which, by fraudulent representations of a partner of such keeper, such person had been induced to sell to such partner and to put thereon. *Perkins* v. *Bailey*, 61.
3. The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of. *Carleton* v. *Franconia Iron & Steel Co.* 216.
4. The owner of a wharf procured a vessel to bring a cargo to it to be there

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discharged, and suffered her to be placed there, at high water, over a rock sunk and concealed in the adjoining dock. Of the position of the rock and its danger to vessels he had long been aware, but gave no notice thereof to the owners of the vessel or any one in their employment. Without negligence on their part, the vessel settled down upon the rock, with the ebb of the tide, and was bilged by it. *Held*, that he was liable in damages, whether or not he owned the soil of the dock, and whether or not his wharf was a public wharf. *Ib.*

5. One who maintains a vault so that with his knowledge filthy water habitually filters from it, whether above or below the surface of the ground, into land of a neighbor, where it injures a cellar and well, is liable in damages for the injury, without other proof of negligence. *Ball* v. *Nye*, 582.

See AFFIDAVIT OF MERITS; BANK, 3; CASE STATED; CONTRACT, 6–8; EASEMENT, 2, 4; INSURANCE, 2; INTOXICATING LIQUORS, 2; LANDLORD AND TENANT, 2, 6; MARRIED WOMAN, 2, 6; MILL AND MILL PRIVILEGE, 1, 2, 7; MONEY HAD AND RECEIVED; OFFICER, 3; PARTNERSHIP, 3; PLEADING; TENANT IN COMMON; TREES, 2; WAY, 2, 4.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADULTERY.

See EVIDENCE, 4.

ADVERSE POSSESSION.

See TREES, 1; WAY, 1.

AFFIDAVIT OF DAMAGES.

See EQUITY, 3.

AFFIDAVIT OF MERITS.

No provision of the Constitution is violated by a statute that, in all actions at law in this court, or the superior court, a default shall be entered against any defendant on whom legal service has been made, unless he or some one in his behalf, within ten days from the return day of the writ, or on or before the last day of the term, when the same does not exceed ten days, or within such further reasonable time as the court for good cause shown may order, files an affidavit that he verily believes that the defendant has a substantial defence to the action on its merits and intends to bring the same to trial. *Hunt* v. *Lucas*, 404.

AGENT.

See PRINCIPAL AND AGENT.

AGREED FACTS.

See CASE STATED.

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AGREEMENT.

See CONTRACT.

AMENDMENT.

See CASE STATED; COURT OF INSOLVENCY; EQUITY, 6; RECORD.

ANSWER.

See PLEADING, III.

ANTENUPTIAL SETTLEMENT.

See ESTATE TAIL; TRUST, 5.

APPEAL.

No appeal lies to this court from a decision of the superior court upon an answer in abatement. *Hamlin* v. *Jacobs*, 500.

See COSTS, 3, 4; SEWER, 4; TRUSTEE PROCESS, 4, 6.

APPORTIONMENT.

See TAX, 4; TRUST, 1 2, 4.

APPRAISEMENT.

See LEASE, 2.

APPURTENANCE.

See EASEMENT, 3.

AQUEDUCT.

See EASEMENT, 4.

ARBITRAMENT AND AWARD.

1. In an action on an award of arbitrators under a submission *in pais* by which the defendant undertook to do an act which he was not legally competent to perform, which undertaking was the consideration for the submission on the part of the plaintiff, *Held*, that the submission, not being binding on both parties, was binding on neither, and, with the award, was void. *Yeamans* v. *Yeamans*, 585.
2. An award of arbitrators appointed by rule of court, if made while the record shows that another person had been substituted in the place of one of them, cannot be accepted, although their proceeding was by agreement of the parties and sanctioned by the court, without that fact appearing also of record. *Hicks* v. *McDonnell*, 459.
3. The submission of a cause of action to four arbitrators by whose "final award" the parties promised to abide; their award "that we come to the

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final conclusion that in the amount of damages we do not agree, but our agreement is that each party pay his own arbitrators" a certain sum each; and the payment of one of the arbitrators by the plaintiff; are no bar to another action by the same plaintiff against the same defendant on the same cause. *Smith* v. *Holcomb*, 552.

See RAILROAD.

ARREST.

See JUDGE.

ASSAULT.

Evidence that one of a noisy crowd near a police officer cried "Kill the damned son of a bitch," about the time when others knocked the officer down, is sufficient to warrant his conviction for an assault upon the officer. *Commonwealth* v. *Hurley*, 433.

See DAMAGES, 1.

ASSESSMENT.

See EQUITY, 2; SEWER, 2–4; TAX, 2, 4; WAY, 2.

ASSIGNMENT.

See BANKRUPT; INSOLVENT DEBTOR, 1; INSURANCE, 3; LANDLORD AND TENANT, 6; LEASE, 1, 2; MARRIED WOMAN, 4.

ATTACHMENT.

Evidence that furniture attached on mesne process in the house of the defendant was left there by the officer, without the defendant's consent, in the custody of a keeper who went away every night leaving no one in charge of it; that on the third day after the attachment the defendant gave the officer notice to remove the keeper, and forbade him to remove the furniture; and that the next morning the keeper went away, leaving no one in charge of the furniture, and giving no intimation of his purpose in going away, nor when he would return; is sufficient to warrant a finding that the attachment was abandoned. *Boynton* v. *Warren*, 172.

See BANKRUPT; EXECUTION; MORTGAGE, 6, 7, 9.

ATTORNEY AND COUNSEL.

The probate court may permit a party cited for examination on a complaint under the Gen. Sts. *c.* 96, § 6, for fraudulently concealing effects of a deceased person, to appear and be assisted by counsel in responding to the charges in the complaint and making answers to interrogatories concerning the same. *Martin* v. *Clapp*, 470.

See JUDGE.

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AWARD.

See ARBITRAMENT AND AWARD.

BAILMENT.

The responsibility of an officer, who attaches a boat, for articles contained therein, but not forming part thereof at the time of the attachment, is merely that of a bailee without hire. *Briggs* v. *Dearborn*, 50.

See BANK, 3; BURDEN OF PROOF, 3; CARRIER, 2, 3, 5.

BANK.

1. It is within the constitutional powers of Congress to establish a national bank in any state, and provide that the shares of its capital stock shall be exempt from taxation by other states. *Flint* v. *Aldermen of Boston*, 141.
2. The U. S. St. of 1864, *c.* 106, § 41, makes unlawful the imposing by, or by the authority of, a state, of a tax on shares owned by an inhabitant thereof in the capital stock of a national banking association organized under that statute, and located in another state. *Ib.*
3. An action against a bank for the conversion or the loss by gross negligence of valuable articles deposited with it as a bailee without hire cannot be sustained on evidence from which the inference that the articles were stolen by servants of the bank, selected and continued in its employment without negligence, who in the proper course of business had access to them, is equally deducible with any other inference. *Smith* v. *First National Bank*, 605.
4. It is not negligence for a bank to intrust its cashier to select and hire and pay out of his salary all the clerks and other servants employed in the banking room; no negligence being shown in the selection of the cashier. *Ib.*

See CHECK; PAYMENT; USAGE.

BANKRUPT.

The provision in the United States bankrupt act, U. S. St. of 1867, *c.* 176, § 14, that an assignment under the act shall vest in the assignee the title to all the bankrupt's property, "although the same is then attached on mesne process," and "shall dissolve any such attachment made within four months next preceding the commencement of said proceedings" in bankruptcy, does not prevent the enforcement of a judgment against the bankrupt on a portion of his property attached in the action more than four months before he commenced proceedings in bankruptcy. *Bates* v. *Tappan*, 376.

See INSOLVENT DEBTOR.

BAR.

See ARBITRAMENT AND AWARD, 3; DIVORCE, 1, 7; ESTATE TAIL; INTOXICATING LIQUORS, 3, 4; LIMITATIONS, STATUTE OF.

BILL OF EXCHANGE.

See PAYMENT, 1; PROMISSORY NOTE; USAGE.

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BILL OF LADING.

See FRAUDS, STATUTE OF, 2.

BOUNDARY.

See CONTRACT, 4, 5; DEED, 4.

BROKER.

See CONTRACT, 6, 7, 9.

BURDEN OF PROOF.

1. On the separate and distinct issue whether the execution of a will was procured by undue influence, the burden of proving undue influence is upon the party alleging it. *Baldwin* v. *Parker*, 79.
2. On the issue whether the execution of a deed was procured while the grantor was of unsound mind or under undue influence, the burden of proving insanity or undue influence is upon the party alleging it. *Howe* v. *Howe*, 88.
3. In an action for the rusting of the plaintiff's iron in the defendant's warehouse by its neighborhood to salt also stored there, the declaration alleged that the defendant received the iron for storage on the ordinary contract of a warehouseman; and the answer denied this, and alleged that it was received on a contract by which the plaintiff assumed all risk of its being injured by the salt. *Held*, that the burden of proof at the trial did not shift to the defendant upon his admitting that he received the iron and stored it where it was injured by salt; but was on the plaintiff throughout to establish the contract on which he relied, and not alone the particular facts from which he sought to deduce it. *Gay* v. *Bates*, 263.

See HOMESTEAD, 2.

BURIAL GROUND.

See TRESPASS.

BY-LAW.

See ACTION, 1; CORPORATION, 3; WAY, 3.

CAPITAL AND INCOME.

See TRUST, 1, 2, 4.

CARRIER.

1. Receivers running a railroad under appointment of a court of chancery in another state, who act as common carriers and are there held liable as such to actions at law, may be sued as common carriers in this Commonwealth. *Paige* v. *Smith*, 395.
2. In the receipt of an expressman for a package addressed to a consignee at a particular place in a certain city, the stipulation that the package "is to be

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forwarded to our agency nearest or most convenient to destination only" does not discharge the expressman from all liability other than for the safe delivery of the package at his own place of business in that city and its safe keeping there upon arrival; but, if he has agents there who habitually deliver such packages according to the special address of each, he is bound to deliver the package as it is specially addressed, according to the reasonable usages of his business; and a usage of expressmen, whenever packages arrive at their places of business specially addressed to consignees at establishments where many persons sojourn or are employed, to deliver them in the offices or counting-rooms of such establishments for the consignees to the clerks there in charge, and take the receipts of the clerks therefor, without giving notice to the consignees personally, is a reasonable usage, in respect to ordinary packages, such as a box of clothing of the value of fifty dollars. *Sullivan* v. *Thompson*, 259.

3. A steamboat connected with a railroad at a wharf owned by the proprietors of the latter; and the railroad connected elsewhere with another railroad, the three forming a continuous line of through transportation of goods. Upon the arrival of the steamboat at the wharf, with goods for through transportation, a list of them, made up from the freight book of the boat, was delivered by the clerk of the boat to the agent of the first railroad, to be forwarded by an early train to the agent of the second railroad at the end of the line, for the purpose of making out and having ready there the consignees' bills of the goods upon their arrival by a later train, which soon afterwards was run down upon the wharf on a track near to the berth of the boat. The employees of the boat and those of the railroad, in equal numbers, then acted in concert in transferring goods from the boat to the cars, partly by hand and partly on trucks some of which belonged to the boat and some to the railroad; all of them sharing both in the removal of goods from the boat to the wharf, and their further removal across the wharf into the cars; and no account was kept by any one of goods delivered by the boat or received by the railroad. While they were thus engaged, and before all of the goods had reached the wharf, a fire broke out which stopped the work and destroyed the boat, wharf, cars and all the goods. *Held*, that the railroad was not liable to the shippers for any of the goods destroyed upon the boat. *Gass* v. *New York, Providence & Boston Railroad Co.* 220.

4. A. wrote to B., a common carrier over one of two routes from the West, that he was about to buy grain in the West, and wished to hear soon if B. was disposed to contract for its transportation, as he should buy in a different market for B.'s route than for the other. B. in reply stated his rates for carrying flour from the end of a canal to several towns. A. then wrote asking whether the rates applied to grain as well as flour, and whether B. would abate a discrimination in them against A.'s town. B. answered that he would carry A.'s flour and grain from the canal to that town at a given rate "to continue in force till close of navigation unless notice to contrary." A. replied the same day accepting the proposal. *Held*, that to ascertain the terms

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of the agreement regard was to be had to the whole correspondence, and not the two last letters only. *Held, also*, that, by the terms so ascertained, the relation of the parties was in the nature of an open proposition by B. to which A. might from time to time give effect as a contract by delivering flour and grain and calling for its transportation, and B.'s right to end which by notice was unqualified. *Held, further*, that after giving A. notice of a change of rates to take effect on a certain day, B.'s obligation to carry any of A.'s flour or grain at the former rates after that day was limited to such flour and grain as at the time of the notice had been delivered to B. by A. for transportation. *Held, further*, that such a notice of a change of rates to take effect in twelve days was reasonable without regard to the extent of A.'s purchases in the West, or the location of his flour or grain there purchased, or B.'s information concerning the same. *Thayer* v. *Burchard*, 508.

5. From the freight house at the station of a railroad corporation, which had agreed with A. to carry his grain over its road at a fixed rate of freight until notice to the contrary, a track extended into the yard of C.'s grain elevator, where C. received and stored the grain at A.'s expense until it was loaded into cars which from time to time the corporation ran into the yard and intrusted to C. to load from the elevator in such proportion as he pleased with grain of A. and of C.'s other customers. *Held*, that delivery at and reception into the elevator, of A.'s grain, accompanied with notice to the corporation that it was there to await transportation under the contract, were equivalent to delivery to and reception by the corporation at the freight house; but that possession by C. of A.'s grain otherwise, or elsewhere than at the elevator, had not such effect. *Ib.*

6. The rolling stock of a railroad corporation, though sufficient for its ordinary business during nine months of the year, was insufficient to carry promptly all the freight of a particular kind, requiring peculiar cars, in three months of a year in which it had made a special contract with a person to transport his freight of that kind without specifying any quantity to be transported or limiting any time for the performance of the service. During intervals in those months between days when he delivered freight to the corporation under the contract and the days when it was loaded on the cars by his storekeeper, into whose yard the corporation sent cars to be loaded at the storekeeper's discretion, he incurred expenses for storage and insurance on that freight. The cars sent to the storekeeper were more than sufficient to have carried all that freight alone so promptly as to have avoided such expenses; but the storekeeper loaded them with it only proportionally with similar freight of his other customers likewise awaiting transportation but with whom the corporation had no special contract. *Held*, that the fact that in those three months every year there was a great accumulation of such freight for transportation over the road was insufficient to render the corporation liable for those expenses on the ground of negligence in its equipment. *Ib.*

See PARTNERSHIP, 2; PRINCIPAL AND AGENT, 2, 3.

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CASE STATED.

It seems, that, in a trustee process submitted to this court on an agreed statement of facts, a citizen of Massachusetts may, since the passage of the St. of 1865, *c.* 179, which authorizes the court to allow amendments changing a suit at law to a proceeding in equity, obtain payment of a debt due to him from a foreign corporation which has been dissolved, out of its property in this Commonwealth. *Folger* v. *Columbian Insurance Co.* 267.

CASES OVERRULED, DOUBTED OR DENIED.

ATKINS *v.* SANGER, 1 Pick. 192. . . . *Shailer* v. *Bumstead*, 128.
BRANDER *v.* BRANDER, 4 Ves. 800. . . . *Minot* v. *Paine*, 108.
CLAYTON *v.* GRESHAM, 10 Ves. 288. . . *Same* v. *Same*, 109.
HOWELL *v.* BARDEN, 3 Dev. 442. . . . *Shailer* v. *Bumstead*, 125.
PARIS *v.* PARIS, 10 Ves. 185. . . . . *Minot* v. *Paine*, 109.
REEL *v.* REEL, 1 Hawks, 248. . . . . *Shailer* v. *Bumstead*, 125.
SAWYER *v.* WOODBURY, 7 Gray, 499. . . *Burlen* v. *Shannon*, 204.
WITTS *v.* STEERE, 13 Ves. 363. . . . *Minot* v. *Paine*, 109.

CHARITY.

A will directing the executor to invest the residue of the estate "as he may deem best as a fund, the annual interest of which shall be applied for the benefit of the sabbath school library of the First Baptist Church in S., or the Baptist Home Missionary Society, whichever may be deemed most suitable," is a good charitable bequest. *Fairbanks* v. *Lamson*, 533.

CHECK.

An attorney at law summoned as trustee in a process of foreign attachment answered that when he received service of the writ he had in his hands a check drawn payable to his order on a bank, but never indorsed nor presented for payment, which he had received, by direction of the principal defendant, in satisfaction of an execution obtained by such defendant in another action, said defendant assuming all risk of its collection; and that, after said service, he presented the check at the bank, and received payment of it, and was holding the proceeds. *Held*, that he was not chargeable as trustee. *Hancock* v. *Colyer*, 187.

See PAYMENT, 1, 2; USAGE.

CITY.

See SEWER; TOWN, 3, 4; TREES, 2; WAY.

COLLATERAL SECURITY.

1. It is competent for a creditor who holds a mortgage or other security for a subsisting debt to absolve the debtor from personal obligation and agree to have recourse to the security alone for payment. *Ball* v. *Wyeth*, 338.

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2. W., to save his relative and friend J. harmless on a credit which J. opened in W.'s favor upon a banker, and to secure the payment of whatever was due or might become due from himself to J., gave to J. a mortgage of various lots of land, including one known as the A. estate. J. assigned this mortgage, except so much as covered that estate, to L., who thereupon paid all of W.'s debt to J., except a balance of fifteen thousand dollars to become due on the credit. W. then, by a deed absolute in form and with full covenants of warranty, conveyed the equity of redemption of the A. estate to J., for the expressed consideration of fifteen thousand dollars, which J. then at W.'s request agreed to pay and did pay to L., who thereupon assumed payment of the balance on the credit. W. gave to J. no note or other form of personal obligation for this sum; and in J.'s agreement to pay it to L. it was described as money paid for the A. estate. At the same time, and as part of the same transaction, an indenture was executed between J. and W., in which J. leased to W. the A. estate for an annual rent, and it was agreed that W. should have the right to redeem the estate within a certain time, and that, after a certain other time, J. should have the right to sell the estate without notice or liability to account, if W. should not have exercised his right of redemption. The term of the lease and the time of the option of redemption were subsequently extended by mutual agreement; and neither then nor in any of the other subsequent dealings of the parties was any reference made to any existing debt of W. to J.; and J. subsequently also named W. one of the residuary legatees in his will, without any intimation that W. was his debtor. *Held*, that the conveyance of the equity of redemption of the A. estate to J. extinguished and satisfied the debt of W. to J. which grew out of the letter of credit, and relieved W. from any personal obligation to J. on account thereof. *Ib.*

See MORTGAGE.

COMMON CARRIER.

See CARRIER.

CONDITION.

See DEED, 3; INSURANCE, 6, 8.

CONFESSION.

See EVIDENCE, 2; EXCEPTIONS, 4; TRIAL.

CONFLICT OF LAWS.

See JUDGMENT; SALE; TRUST, 5.

CONSIDERATION.

See CONTRACT, I.

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CONSTITUTIONAL LAW.

A bill is not laid before the governor for his revisal, nor presented to the governor, within the meaning of the Constitution of Massachusetts, part 2, c. 1, § 1, art. 2, by being sent from the senate or house of representatives to the secretary of the Commonwealth; but must be laid before the governor personally. *Opinion of Justices*, 636.

See AFFIDAVIT OF MERITS; BANK, 1, 2; LIMITATIONS, STATUTE OF; TAX, 1.

CONTRACT.

I. *Consideration.*

See ARBITRAMENT AND AWARD, 1; INSOLVENT DEBTOR, 2; INTOXICATING LIQUORS, 2–4.

II. *Parties.*

See PLEADING, 1; SHIPPING, 1.

III. *Construction.*

1. No demand or notice is necessary before bringing an action on a contract after the expiration of a definite time which by the terms of the contract was fixed for its performance. *Negus* v. *Simpson*, 388.
2. As part of the consideration for the price paid for a machine, the seller of it agreed with the buyer, that if on a fair trial by the buyer it should not "prove to be suited for the purpose" for which he bought it, and "entirely satisfactory in all respects" to him, he might return it, and the seller, on receiving it, would pay back the price. The machine, on a fair trial by the buyer, "failed to answer the purpose for which he bought it," and proved unsatisfactory to him; and he returned it without first giving the seller notice of any difficulty, or opportunity to remedy it, and sued him for the price, after demanding and being refused repayment thereof. *Held*, that the buyer was not bound to give any such notice or opportunity; and that it was immaterial that the machine, after its return to the seller, worked well, under his management, without alteration or repairs. *Aiken* v. *Hyde*, 183.
3. A builder agreed with the United States to construct, under the superintendence of their inspectors, two steamboats, for a price certain percentages of which should be paid to him from time to time in a proportion to the progress of his work, and that the United States should have "a lien on the vessels and on all the materials provided for the fulfilment of this contract, for the money advanced or paid by the United States on account thereof." Afterwards he made a contract with a machinist for the latter to build the engines for these boats for a stipulated price for each engine when set up in the boat, and with a general understanding that he should make payments to the machinist on account of the work during its progress, but with no specification of the percentages or times of payment. As the work on the engines went on, the United States made payments to the builder, and the builder to

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the machinist, on account thereof. *Held*, that the latter contract did not transfer the property in the engines to the builder before their completion, nor the former contract divest the machinist of his property in them. *Wright* v. *Tetlow*, 397.

4. In a written contract for the purchase of land for a gross sum, a description of the land by its boundaries, or the insertion of the words "more or less," or of equivalent words, will control a statement of the quantity of land, or of the length of one of the boundary lines, so that neither party will be entitled to relief on account of a deficiency or surplus, unless in case of so great a difference as naturally raises the presumption of fraud or gross mistake in the essence of the contract. *Noble* v. *Googins*, 231.
5. A. agreed in writing to pay B. a gross sum for a "wharf lot on C. street" extending from the street to the channel, and described as bounded on one side by D.'s shipyard, and on the other side by the shipyard of E., and as "measuring about two hundred and twenty feet on C. street, more or less." In fact, it measured only one hundred and seventy feet on C. street, and was proportionally less valuable. At and long before the time of signing the agreement, deeds of the lot and of the adjoining shipyards, showing their actual width and boundaries, were duly recorded in the registry of deeds. *Held*, that in the absence of fraud A. was not entitled, in law or equity, to any abatement of the stipulated price. *Ib.*
6. An action on a special contract of the defendant to pay the plaintiff the usual commissions for his services if he would procure a purchaser for property of the defendant, with a count on an account for "commissions for services as broker in getting a customer to purchase" the property, cannot be maintained without proof of a sale of the property, or of an agreement for the sale thereof binding on the defendant. *Drury* v. *Newman*, 256.
7. Evidence that A., owning certain stock, offered to pay B. a commission if B. would sell it, and told him to communicate any offer for it, but did not name a price; that B. procured an offer of a sum which A. refused, naming a higher price; that B. then, after a conversation with C. about buying the stock, wrote to A. that he thought that A. could sell C. the stock if A. would meet C. at a certain time and place; and that A. met C. accordingly and sold him the stock at the higher price; will not support an action by B. against A. for the commission. *Gillespie* v. *Wilder*, 170.
8. W. and D. made a written contract, the first clause of which stipulated that D. should build without expense to W. six machines under a patent owned by W., and, whenever either should sell "a machine out of said six or other machines D. may build under said patent," W. should have a share of the proceeds, and D. the balance; and another clause fixed a minimum price per machine. The second clause provided that D. should build "any number of said machines more than six that W. may order, if W. does not order more than twelve at any one time;" and it was agreed that, in event of such order, D. should build "two of them each month thereafter, until the whole order is filled." A further clause provided that either might terminate the contract

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on four months' notice to the other; "but, when notice is given, all orders up to the end of that time which have been given are to be filled," "and all machines not completed to be completed;" and, if such notice should be given by W., "all machines which W. orders, together with any others which D. may have built or may be building at the time notice is given, to the number of six, are to be taken by W., and paid for" at a certain rate; but "if notice is given by D., then for all machines ordered or built or being built at the time the contract terminates, D. is to take the same and pay W. therefor" a certain sum "apiece, or deliver the same to W. within one month after the termination of the contract, by W's paying D. therefor for each machine" a certain sum. And finally it was agreed that, "if W. is not paid the sums above stipulated by D. on the sale of each and every machine, then W. shall have the right to terminate this contract at once, without notice." Four of the six machines being finished, and the two others partly built, D. wrote to W. that after finishing the six a new arrangement would be necessary on account of the advance in price of material and labor. W., a few days later, gave D. an order for twelve additional machines. D. soon afterwards gave W. a formal notice for termination of the contract in four months; and then finished the two machines; and refused to build any of the twelve. Part of the six finished were sold, and the proceeds divided under the contract; and part remained unsold in D.'s hands. *Held*, 1. that the clause relating to termination of the contract by either party on four months' notice did not apply to the six machines stipulated for in the first clause, and that D. was under no obligation to pay W. anything on account of either of them until after its sale; 2. that D.'s agreement to take "all machines ordered or built or being built" at the time the contract should end by notice from himself did not embrace the twelve machines ordered by W. but never begun to be built; but 3. that W. could hold D. liable in damages for failing to build two machines per month up to the end of the four months in partial execution of such order. *Weed* v. *Draper*, 53.

See BURDEN OF PROOF, 3; CARRIER, 2, 4; DAMAGES, 4, 5; INSURANCE, 7, 8; PARTNERSHIP, 3; SALE.

IV. *Rescission.*

9. A., having ready for delivery in a bonded warehouse in a city a certain quantity of oil of a particular kind, made a contract with B. to deliver to B. for an agreed price such a quantity of oil of that kind in such a warehouse in that city during a certain month at buyer's option on ten days' notice within the month. About ten days before the end of the month, B. employed a broker to sell the oil thus contracted for, who sold it to A. for a price less than the price agreed in the original contract. *Held*, that there was no rescission of that contract, although the oil never passed from the actual possession of A.; that the authority given by B. to the broker to sell the oil included the exercise of the option to take it under the contract; and that the resale of it by the broker to A. implied an acceptance of it from A. as B.'s

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property, which dispensed with the necessity of any formal delivery and redelivery of it. *Warden* v. *Marshall*, 305.

See FIXTURE, 2; FRAUDULENT REPRESENTATIONS, 1; INSOLVENT DEBTOR, 2, 3; MISTAKE.

CORPORATION.

1. To decree an absolute and final dissolution of a corporation at the suit of an individual is no part of the general jurisdiction of a court of law or of equity, and can be justified only by express statute. *Folger* v. *Columbian Insurance Co.* 267.
2. A foreign corporation can be sued in this Commonwealth only by means of an attachment of its property, unless jurisdiction otherwise is expressly given by statute. *Andrews* v. *Michigan Central Railroad Co.* 534.
3. A. owned twenty shares in the stock of a corporation, the certificate of which stood in his name, and fifty shares, the certificate of which stood in the individual name of B., the president of the corporation, as collateral security for A.'s promissory note; both certificates expressed to be transferable by A. and B. respectively, "on producing this certificate," and to be subject to a by-law which prescribed conditions precedent to any sale of the stock. After complying with the by-law, A. sold the seventy shares to C., to whom he gave an assignment of the twenty shares on the back of the certificate thereof, and a separate assignment of the fifty shares subject to B.'s claim. C. paid A.'s note to B.'s clerk, who receipted in B.'s name for the payment on the back of the certificate of fifty shares, and gave it up, with A.'s note, to C., all in the presence and with the knowledge of the treasurer of the corporation, of whom C., having both certificates and assignments with him, asked a transfer of the seventy shares and the issue of new certificates thereof in C.'s name. This the treasurer refused, on the sole ground that A. had not complied with the by-law; but afterwards took from C. copies of the two assignments, and promised to send him new certificates at the end of a week. Not having then received them, B. wrote to the treasurer, again demanding a transfer and new certificates; and, receiving no reply, sued the corporation for conversion of the shares, waiving all his own claim or right therein and offering to transfer the same to the corporation. *Held*, that C. might maintain the action; that it was immaterial that B. was sick at the time of C.'s demands and until after the bringing of the action, and so could not sign any transfer or certificates; and that it was also immaterial that C. did not leave the old certificates with the treasurer, if copies of the assignments were all that the treasurer required of him. *Bond* v. *Mount Hope Iron Co.* 505.

See ACTION, 1; CASE STATED; JUDGMENT; TAX, 1–3; TRUST, 1.

COSTS.

1. In an action at law neither party has a legal claim for costs against the other until after a final judgment. *Ross* v. *Harper*, 175.

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2. The costs of a bill in equity brought by executors and trustees to obtain the instruction of the court as to the construction of a bequest are to be borne by the residuary assets. *Bowditch* v. *Soltyk*, 136.

3. On an appeal improperly taken by the defendant from a judgment of the superior court charging a trustee in foreign attachment, the trustee is not entitled to costs. *Kellogg* v. *Waite*, 501.

4. Trustees in foreign attachment who are charged on their answers in a justice's court are not entitled to costs for travel and term fees in the superior court on the appeal of either the plaintiff or the defendant from the judgment of the justice on the main issue in the action. *O'Donnell* v. *McIntire*, 551.

See EQUITY, 8.

COURT.

See EXCEPTIONS, 3; FOREIGN LAW.

COURT OF INSOLVENCY.

The courts of insolvency, being courts of record, have authority to amend errors in their records. *Marsh* v. *McKenzie*, 64.

See RECORD.

COVENANT.

See EASEMENT, 4; LEASE, 1; MARRIED WOMAN, 4.

CRUELTY.

See DIVORCE, 1, 2, 4, 6, 8.

CUSTOM.

See USAGE.

DAMAGES.

1. In assessing damages for an assault and battery, the jury may consider as an aggravation of the tort the mental suffering of the plaintiff from the insult and indignity of the defendant's blows. *Smith* v. *Holcomb*, 552.

2. At a trial to assess damages for an injury sustained by a laborer through a defect in a highway, increased damages were not claimed on account of others dependent on the plaintiff for support; and there was no evidence that any one was so dependent; nor any evidence of what family he had, except such as was introduced incidentally and without objection. *Held*, that, under these circumstances, there was no ground of exception to the addition by the judge to an instruction to the jury "that the plaintiff was entitled to recover damages for the diminution of his ability to labor," of the words "for his own support and the support of those dependent on him." *Howes* v. *Ashfield*, 540.

3. A factor received tobacco for sale, and agreed not to sell it for less than forty cents per pound, and to hold it subject to his principal's orders until sold at

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that price. He did not sell it at that price, nor obey the orders of his principal in relation to it, and refused to return it on demand. At the time of the demand it was worth forty cents per pound. In an action by the principal against the factor on the agreement, the defendant requested a ruling that, if he sold any of the tobacco for less than forty cents per pound, he was liable only for its fair market value at the time of sale. This the judge refused; and ruled, in substance, that the plaintiff might recover, for the loss sustained by the failure to obey his orders, not exceeding forty cents per pound, or the market value of the tobacco at the time when the return was demanded; and that the increase of market value up to forty cents per pound before the demand for a return was an item of damage. *Held*, that the defendant had no ground of exception. *Maynard* v. *Pease*, 555.

4. The material part of a contract, made by the master, and binding on the owners, of a vessel bound on a certain voyage, was thus: "Received of N. & Co., on account of vessel and owners, a chronometer, Name N., No. 1166, Value $240, on hire," "at the rate of six dollars per month until the said chronometer shall be returned to them," "to be returned" "at the expiration of the present voyage, or within fourteen months from the date hereof, in the same good order as received." The master "has the privilege of buying this chronometer within six months from date for $240 cash." In an action by N. & Co. against the owners of the vessel for failing to return the chronometer as stipulated, *Held*, that the measure of damages was the stipulated hire of the chronometer for fourteen months, with its value at the end of that time, and with interest from that time on the whole amount so ascertained; and that the recital of a value in the contract was not conclusive as to the value, although proper to be considered by the jury in assessing the same. *Negus* v. *Simpson*, 388.

5. A. paid to B. bonds of a railroad corporation for goods bought; agreed to deliver to B. within a certain time similar bonds indorsed by another corporation, on condition that B. should upon such delivery restore the bonds first named; and failed to do so, although B. at the end of the time tendered to him said first named bonds. B. then sued A. on the agreement; and while the action was pending B.'s bonds were stolen. *Held*, that, without delivering those bonds to A., although the inability to do so resulted from theft, B. could recover only the excess of the value of the indorsed bonds over the value of the bonds stolen; that the circumstance that the stolen bonds had no market value was not conclusive that they had no value in fact; and that to show that they had some actual value evidence was admissible that they belonged to a set of bonds secured by a mortgage of the road, a section of forty miles of which had been graded and "was worth about the amount of the bonds" of that set. *Murray* v. *Stanton*, 345.

See CONTRACT, 8; EQUITY, 3; EXCEPTIONS, 9; LEASE, 2; TREES, 3; TRESPASS; WAY, 2.

DEAD BODY.

See TRESPASS.

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DECLARATION.

See PLEADING, II.

DEED.

1. Execution of a deed in presence of an attesting witness is some evidence from which to infer a delivery thereof. *Howe* v. *Howe*, 88.

2. A warranty deed of land, duly executed and recorded, raises a presumption that the grantor had a title which he could convey, and that he by his deed vested a seisin of the premises in the grantee. *Farwell* v. *Rogers*, 33.

3. A., owning a lot of land, gave a bond to B. to convey it to him whenever he should convey to A. or his assigns a certain other lot; and afterwards gave to C. a deed of it on condition that the grantee should convey it to B. "whenever tendered a like conveyance of the lot to be granted as an equivalent therefor as mentioned in the bond," and took back a mortgage of it, subject to the same condition. C., at the same time that he gave this mortgage to A., gave a deed of warranty of the lot to B., with the clause "for conditions and obligations see said deed from A. to me," and without receiving the other lot in exchange. *Held*, that by the deed from A. to C. the title to the land passed subject only to A.'s right of defeasance upon breach of the condition; and that the deed from C. to B. operated only as a conveyance of it subject to the mortgage from C. to A. *Shattuck* v. *Hastings*, 23.

4. In a deed of two lots of land, separated by intervening lots, the premises were described by metes and bounds and by distances, the starting point of the boundary line of the first lot being stated as at its northwestern corner 107 feet from M. Street, and that of the second lot as at its northeastern corner 307 feet from the corner of M. Street; and were further described by abuttals upon T. Street on the north, and on the south exclusively and respectively upon lots 44 and 47 on a plan, drawn six years previously, to which the grantor made reference as meaning to convey "the westerly portion of lot numbered 36" and "the easterly portion of lot numbered 39, on said plan." And he further described the granted premises as lots 1 and 2, and lots 9 and 10, on another plan, drawn on the same date with the deed. In this second plan, which embraced only part of the territory included in the first, no express reference was made to M. Street, but figures noted at corners of the lots indicated that 107 feet and 307 feet were the respective distances of the northwestern corner of lot 1 and the northeastern corner of lot 10 from some point not indicated; and all the other distances in the deed corresponded with the distances in this plan. But in the first plan, in which M. Street was represented as running obliquely to T. Street, the northwestern corner of lot 36 and the northeastern corner of lot 39 were represented at distances respectively of 107 feet and 8 inches, and 307 feet and 8 inches, from the southeastern corner of M. and T. streets. Assuming the relative courses of M. and T. streets to have remained unchanged during the time between the two plans, and following out the boundary lines of the granted premises from points 107 feet and 307 feet east from the southeastern corner

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of M. and T. streets, the first lot conveyed would include, besides the "westerly portion of lot 36," a strip 8 inches wide along the whole eastern portion of lot 35 on the first plan, and the second lot conveyed would not include a strip of the same width along the whole "easterly portion of lot 39;" and the southern abuttal of the first lot would not be exclusively on lot 44, nor that of the second lot exclusively on lot 47. But, applying the second plan to the first plan so that the westerly line of lot 1 on the former should correspond with the westerly line of lot 36 on the latter, and assuming the variation of eight inches between the measurements from M. Street to be due either to a difference of starting points on the line of M. Street, or to a variation in the relative courses of the streets during the time between the two plans, all the courses, distances and abuttals expressed in the deed would correspond with both plans. *Held*, that the statement of the starting point of the boundary line of the first lot conveyed in the deed, being ambiguous, must be controlled by the other calls of the description of the two lots, which were certain, and must be assumed to be at the point on T. Street which at the date of the first plan was the northwestern corner of lot 36 thereon indicated; especially if such a construction was in accord with the practical construction given to the deed by the grantees or their immediate assigns in erecting a house covering the whole area so bounded. *Stevenson* v. *Erskine*, 367.

5. Influence properly gained, although used for a selfish purpose and to obtain an unjust advantage, will not avoid a deed thereby procured, unless there is fraud or duress, or unless it is so exerted as to substitute the will of him exerting it for that of the grantor to such a degree that the latter is no longer a free agent. *Howe* v. *Howe*, 88.

See Burden of Proof, 2; Easement; Evidence, 10, 11; Landlord and Tenant, 1; Lease; Mill and Mill Privilege, 6, 7; Mistake; Trust, 3; Witness, 3.

DEFAULT.

See Affidavit of Merits.

DEPOSITION.

If an answer in a deposition is offered to be read at the trial only as a whole, and part of it is incompetent, the whole is inadmissible. *Townsend* v. *Pepperell*, 40.

DEVISE AND LEGACY.

See Charity; Costs, 2; Will, 1, 2.

DISSEISIN.

See Equity, 1; Way, 1; Writ of Entry, 2, 3.

DIVIDEND.

See Trust, 1.

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DIVORCE.

1. A party to a marriage by whose extreme cruelty the desertion of the other party has been caused, or a husband whose gross or wanton and cruel neglect to provide suitable maintenance for his wife, he being of sufficient ability so to do, has caused her desertion of him, cannot maintain a libel on the Gen. Sts. *c.* 107, § 7, for a divorce on the ground of such desertion. *Lea* v. *Lea*, 493.

2. The voluntary character of the withdrawal of a wife from cohabitation with her husband, caused by his extreme cruelty or his gross or wanton and cruel neglect to provide suitable maintenance for her, he being of sufficient ability so to do, does not deprive her of her right to a divorce on the ground of desertion, although he accompanies his acts of cruelty or neglect with permission for her to leave him. *Ib.*

3. A decree dismissing a libel for a divorce, which may have been entered upon the ground of either one of three sufficient defences relied on by the libellee, is conclusive between the parties as to neither of them. *Ib.*

4. A decree dismissing, after a hearing on the merits, the libel of a husband, on the Gen. Sts. *c.* 107, § 7, for a divorce from his wife on the ground of her desertion continued for five years consecutively without his consent, in defence against which she denied that she was guilty in manner and form as alleged, and specified that her withdrawal from him was caused by his extreme cruelty, or his wanton and cruel neglect to provide suitable maintenance for her, he being of sufficient ability so to do, is no bar to a libel by her against him, on the same statute, for a divorce for the same desertion. *Ib.*

5. At the trial, with a jury, of a libel for divorce, their special findings on questions of fact are not conclusive of facts not essential to, although consistent with, their general verdict and the decree entered thereon. *Burlen* v. *Shannon*, 200.

6. At the trial, with a jury, of a libel, filed in Massachusetts, for a divorce for the cruelty and desertion of the libellee, he denied the charges, and set up his divorce from the libellant by a court of competent jurisdiction in Indiana; and she sought to impeach this divorce, on the grounds that he went to Indiana to procure it, and that he was not a citizen of Indiana when he there filed his libel. Special issues were submitted on these questions, and on the questions of cruelty and desertion, and findings made on each for the libellee; a general verdict was returned in his favor; and exceptions taken by the libellant were not sustained, the full court being equally divided. In an action here against the libellee for the board of the libellant subsequent to the Indiana divorce, *Held*, that the validity of that divorce was not established by the proceedings recited; and that the plaintiff might impeach it. *Ib.*

7. If a decree dismissing a libel for divorce for the desertion of the libellee does not set forth that the dismissal is without prejudice, it is a bar to a subsequent libel of the same libellant for a divorce from the bonds of matrimony

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for a desertion of the same libellee which began not less than five years before the filing of the former libel. *Thurston* v. *Thurston*, 39.

8. At the trial of an action for board of the defendant's wife after her desertion of him which is sought to be justified on the ground of his cruelty, the record of the dismissal, after a hearing of both parties on the merits, of a libel for divorce, which, after such desertion, she brought against him for the same acts of cruelty, is not conclusive of the facts then at issue. *Hubert* v. *Fera*, 198.

See TRUST, 5.

DOMICIL.

1. A person legally capable of choosing or changing his domicil, who is residing in a city or town in this Commonwealth with the purpose of there remaining for an indefinite time, and without retaining and keeping up any intention to return to his former home in another city or town in this Commonwealth, has his domicil in the place of his actual residence. *Wilbraham* v. *Ludlow*, 587.

2. A person legally capable of choosing or changing his domicil, who abandons his home and thenceforth wanders from town to town, working as a day-laborer, "with no purpose in view, and with no opinions, desires or intentions, in relation to residence, except to have a home wherever he works," ceases to have a continuing domicil, for the purpose of acquiring a settlement, in the town where the home is which he so abandons. *Ib.*

DRAIN.

See SEWER.

DRUNKARD.

See INTOXICATING LIQUORS, 1.

EASEMENT.

1. In a reservation of a right of way over a lot of land for the purpose of repairing a building on an adjoining lot at all times when necessary, the provision that "said passway shall be only a foot passage for said purpose" does not definitely locate the way. *Phipps* v. *Johnson*, 26.

2. If the grantor of a lot of land reserves "the right to pass and repass over the granted premises for the purpose of repairing his building" on an adjoining lot "at all times when necessary," the grantee is entitled to reasonable notice of the intention of the grantor to make repairs, before being liable to an action for obstructing the right of way. *Ib.*

3. The owners of a lot of land, by deed reciting that it was found necessary that a passageway twenty feet wide should be laid out and kept open over their lot for the accommodation of an adjoining parcel of land, granted for a valuable consideration to the owners of said parcel, their heirs and assigns, these rights, privileges and easements, namely, that a strip of the grantors'

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lot, twenty feet wide, and adjoining the grantees' parcel through its whole length, "shall not be subject to have any fence or building erected thereon," and that the owners of the parcel, and the future proprietors or occupants thereof, or of any part thereof, "shall have the right to the use, in common with" the said grantors, "of the said spaces of twenty feet wide for the accommodation of their said land or estates bounding thereon." *Held*, that the owner through mesne conveyances from said grantees of one of the lots into which their parcel was afterwards divided, was entitled, as appurtenant to his estate without express mention thereof in said deeds of conveyance, to have the strip of land twenty feet wide kept open to the sky; and might maintain a bill in equity against said grantors to prevent the erection by them of a building over said strip, though so planned as to leave a passage-way more than fifteen feet high under itself, and to be supported upon buildings owned by said grantors adjoining said strip on either side thereof. *Schwoerer* v. *Boylston Market Association*, 285.

4. B. owning, on the west side of a road, a tract of land on which stood his house and barn, conveyed by deed of warranty to L. C. a lot of it, south of the house and barn, "together with the privilege of taking water from my aqueduct" to the granted premises. The aqueduct used by B., beginning at a spring on land of H. east of the road, ran through H.'s land, and then through land of F. to the road, which it crossed; then entered B.'s tract at a point south of his house; continued westerly to an outlet which supplied the house; then ran to another outlet at the barn; and was laid in the lands of H. and of F. under oral licenses, for which no consideration was paid. From the outlet at the barn L. C. drew water. After B.'s conveyance to L. C., H., whose land reached to the road at a point north of the land of F., conveyed to B. the right to take water from that spring, or another near it, "with the same sufficiency of water as he now has," and "carry the same by aqueduct in a direct line through H.'s land to B.'s premises, as B. now does, or through H.'s land the whole distance to the road." B. then conveyed to R. his whole tract of land, with "all the right of conducting water from a spring which I have obtained from H.," excepting however expressly from this conveyance the lot included in his deed to L. C., and "the privileges therein contained." R. divided the tract into lots, and sold one of them, including B.'s former barn, to R. C.; and sold to P. another lot, (including B.'s former house and the outlet which supplied the house with water,) together with all B.'s right of conducting water from a spring on the land of H., subject, however, to the right which B. conveyed to L. C. P. then sold the house lot to X., without any right in the springs or aqueduct. F., after all this, sold his land; and his grantee revoked the license under which the aqueduct was laid through it, and dug up that portion of the pipes. R. C. and L. C. thereupon laid a new aqueduct from the spring, over a new route, which ran wholly through the land of H. to the road, which it crossed at a point north of the house lot, then entered P.'s land, and, turning, ran southerly and across the house lot to the original outlet at R. C.'s barn. In

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a suit in equity by L. C. to restrain P. from digging up the portion of this new aqueduct which crossed P.'s land, "assuming that B.'s deed conveyed to L. C. an interest in the spring itself and in the aqueduct by which the water was conducted to the premises of B., so as to entitle L. C. to maintain and keep the aqueduct in repair in case the general owner should fail to do so, and to have her remedy against any one who should interrupt her in doing this," *Held*, that the right of L. C. in the spring, and in the conducting of water from the spring, was only a right to share with her grantor, or those having his estate, in the limited quantity of water which was conducted from the spring in his aqueduct; and did not include a right to lay a new aqueduct to the spring for her separate use. *Held, also*, that for any failure of her grantor's title in the spring, or in his aqueduct, her remedy was by action on the covenants in his deed. *Cheney* v. *Pease*, 448.

See EQUITY, 5; MILL AND MILL PRIVILEGE; WAY, 1.

EMBEZZLEMENT.

The servant of a copartnership fraudulently appropriated money which he had received from one member of the firm under the direction to carry it to another member. *Held*, that he was not liable on an indictment for embezzlement. *Commonwealth* v. *Berry*, 428.

See LARCENY, 1.

EQUITY.

1. A person in possession of land, and taking the rents and profits, may, notwithstanding the Gen. Sts. *c.* 134, §§ 49, 50, maintain a bill in equity to quiet his title, against one who, as to him, is dispossessed and disseised, but asserts an adverse title under a mortgage the validity of which is denied by the plaintiff. *Clouston* v. *Shearer*, 209.
2. In this Commonwealth, the remedy at law of a person upon whom a tax is illegally assessed by a town or city is plain, adequate, complete and exclusive, in event of the collection of the tax; and this court has not jurisdiction in equity to restrain such collection. *Loud* v. *Charlestown*, 208.
3. No affidavit of the amount of damages, under the Gen. Sts. *c.* 112, § 6, is necessary to give this court jurisdiction of an action in which relief in equity is prayed for. *Stockbridge Iron Co.* v. *Cone Iron Works*, 468.
4. A bill in equity to annul a decree obtained in fraud of the plaintiff ought ordinarily, by analogy with the period fixed by statute for the suing out of writs of review as of right, or the filing of petitions for review of judgments in civil actions, (Gen. Sts. *c.* 146, §§ 20, 21,) to be filed within one year from his discovery of the fraud. *Evans* v. *Bacon*, 213.
5. The proprietors of a lot of land granted such rights in a strip of it that the several owners of lots into which an adjoining parcel of land was afterwards divided became entitled to have the strip kept open to the sky; and one of said owners filed a bill in equity to restrain said grantors from constructing a building over the strip between buildings which they owned adjoining the

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strip on either side thereof. *Held*, that if, during the pendency of such a suit in equity, such a building should be erected by said grantors, in pursuance of a contract made by them, before the filing of the bill, with parties who, while the suit was pending, became lessees of said adjoining buildings, an effectual decree could be made for its removal without making the lessees parties to the bill, although the answer of the grantors alleged that they had "a contract for a valuable lease of the said buildings which requires them to erect said connecting structure, and that to be deprived of it would be a great and serious detriment to them." *Held, also*, that it was not necessary to make the owners of the other lots into which the parcel was divided parties to the bill. *Schwoerer* v. *Boylston Market Association*, 285.

6. In a suit in equity to redeem land from a mortgage, if in his answer the mortgagee includes the mortgage debt and interest in an account of the amount which he claims as due on the mortgage, the mortgagor has a right, under the eighteenth rule in equity, to amend his bill so as to allege usury in the original contract. *Gerrish* v. *Black*, 315.

7. A plaintiff in a bill in equity to redeem land, who, on discovering upon the docket the entry of a decree dismissing his bill, files a petition to annul it, which after a hearing of the parties is denied, cannot maintain a bill, which he delays, without explanation, to file until two years and four months afterwards, to set aside the decree on the ground that it was obtained by fraud, but must be deemed to have waived his rights in that respect, although it does not appear that his petition was not dismissed for mere defect of form. *Evans* v. *Bacon*, 213.

8. It is no ground for reversing or modifying a decree enjoining the plaintiff in an action at law, in which he has obtained a verdict, from further prosecuting the same, that it provides that in such action neither party shall recover costs. *Ross* v. *Harper*, 175.

See Case Stated; Contract, 4, 5; Corporation, 1; Easement, 3; Mill and Mill Privilege, 3, 4; Mistake; Partnership, 3; Patent.

ESTATE AT WILL.

See Tenant at Will.

ESTATE TAIL.

A daughter, who took under her father's will an estate tail in remainder after the life estate of her mother in part of his real estate, conveyed, in her mother's lifetime, in 1830, by an antenuptial settlement, "the share or portion" which she was "entitled to receive out of the estate of her father," in trust, for the trustee "to claim, receive and take possession, as soon as practicable and it shall be lawful to do so, all her share and portion aforesaid, whether said share and portion consists of real, personal or mixed property," and hold the same to certain uses, reserving to herself power to appoint other uses, "notwithstanding her coverture, by any writing under her hand and seal." In 1850, after the death of her mother, she appointed other uses by

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such a deed without the joinder of her husband; and a few days later joined with him in an indenture, by which the former trustee conveyed to a new trustee the trust estate, but which contained no words of grant or covenant on her part; and shortly afterwards died. *Held*, that none of these deeds barred the entail; and that her life interest only in the real estate was held in trust under them. *Whittaker* v. *Whittaker*, 364.

ESTOPPEL.

1. A verdict and judgment are conclusive by way of estoppel only as to facts without the existence and proof or admission of which they could not have been rendered. *Burlen* v. *Shannon*, 200. *Lea* v. *Lea*, 493.
2. Special findings of a jury in an action at law, not confirmed by a judgment of the court nor involved in a general verdict, are not conclusive of the facts found, on either party, in another trial of the same cause. *Hawkes* v. *Truesdell*, 557.

See DIVORCE, 3–8; EASEMENT, 4; ESTATE TAIL; LANDLORD AND TENANT, 2, 4; MILL AND MILL PRIVILEGE, 6; PROMISSORY NOTE, 2; WRIT OF ENTRY, 2.

EVIDENCE.

1. On the trial of an indictment for murder, the Commonwealth called a witness who testified to seeing the two defendants come from a room, where the dead body was found, under such circumstances as tended to show that they were guilty of the crime. *Held*, that the Commonwealth could not show, by other witnesses, that immediately, and while giving the alarm, he told what persons he saw come from the room, and gave their names. *Commonwealth* v. *James*, 438.
2. Although by consent, or for reasons of incompetency, the confession of the defendant is to be excluded, on the trial of an indictment for murder, it may be proved that he said something about a particular weapon, (without giving his words,) in consequence of which a witness went to a certain place and there found such a weapon. *Ib.*
3. On the trial of an indictment for larceny of six oxen, after introducing evidence that the oxen were stolen and killed and their meat was sold, the Commonwealth proved admissions of the defendant that he killed them and sold the meat on account of a person to whom he paid the whole proceeds of the sale, being a sum named. *Held*, that the Commonwealth might also prove, with a view to show the falsity of the defendant's statement of his disposal of the proceeds, that on the day of the sale he bought other oxen of another person and paid for them a sum nearly the same; and that his whole property was mortgaged for more than it was worth, and he had no pecuniary credit. *Held, also*, that statements of the person to whom the defendant claimed to have paid the proceeds, that he himself stole "two other oxen" which were found astray on a highway on the same day on which the six were killed, were inadmissible, either to affect the credibility of such person

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as a witness, or to prove that he "had stolen those two oxen and that they were part of the original six." *Commonwealth* v. *Grose*, 423.

4. On the trial of a joint indictment of a man and woman for adultery with each other, which charges that at the time of the offence she was the wife of another man, her admission, in her paramour's absence, that she was so, is not competent evidence against him. *Commonwealth* v. *Thompson*, 444.
5. In an action by an agent against his principals for wages for services rendered under a contract terminated by them, evidence that, on terminating it, they credited him on their ledger for the full amount of his stipulated wages up to that time, is competent to prove that they waived any claim to a forfeiture thereof; although the entry on the ledger was made without his knowledge. *Bell* v. *Smith*, 617.
6. To prove that a person was diseased when he enlisted, evidence is not admissible, in an action to which he is not a party, of his statement, shortly before enlisting, to a witness not an expert, of what a physician had told him concerning his health; nor of his statement, afterwards, to this witness, that he was diseased before he went into the army; nor of the opinion of the witness that before enlisting he did not appear like a well man. *Ashland* v. *Marlborough*, 47.
7. On trial of the issue of the insanity of a woman during a certain period, a witness being asked where the woman then lived, and replying that her home was with her father but she used to make visits elsewhere, his further reply that people used to have a great deal of sympathy with her is inadmissible, although offered as showing how she came to make such visits. *Townsend* v. *Pepperell*, 40.
8. On trial of the issue of the insanity of a woman during a certain period, evidence of her general reputation in the neighborhood at that time as insane, and of declarations of her parents and others, since deceased, that she was then insane; and opinions of witnesses personally acquainted with her but not experts, as to her mental condition at that time; are inadmissible. *Ib.*
9. A record of the condition and treatment of a patient in a hospital, produced at a trial forty years after its date, by the superintendent of the hospital, as part of a series of records, of which he is the official custodian, purporting to be contemporaneously made by the attending physicians, of all cases there treated, and which it is their duty to make, is admissible in evidence, as a foundation for the opinion of an expert whether it indicates mental disease of the patient, without identifying the person who made it. *Ib.*
10. To impeach the validity of a deed, evidence of declarations of the grantor, while of sound mind, prior to the execution of it, as to his intentions concerning the disposal of the granted premises, is admissible, when offered "among other circumstances tending to prove unsoundness of mind, undue influence and fraud;" especially if it is a deed of gift disposing of the grantor's estate among his children and omitting any provision for the issue of a deceased child. *Howe* v. *Howe*, 88.
11. On the issue whether a deed is invalid by reason of the execution thereof

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while the grantor was of unsound mind or under undue influence, evidence that several months afterwards he remembered executing it, understood what he had done thereby, gave his reasons therefor, and expressed no regret or dissent, is admissible as tending to show sanity and ratification. *Ib.*

12. A will made in favor of the testator's second wife and her children was contested, upon the grounds of undue influence and of insanity, by the children of the first wife, who introduced evidence of the amount of his property at the time of the second marriage, and of harsh treatment of themselves by the second wife. She, being called as a witness, and asked to state in reply, as nearly as she could, the amount of the testator's property at the time of their marriage; and whether he was then much in debt; and, if so, to what amount; answered that she could not tell exactly, but did not think that, if his debts had been paid, his property would have amounted to a sum which she named, nor to half of it; that he was much in debt, but she could not tell how much. Being also asked how she treated her step-children, whether kindly or otherwise; and whether she failed in her duty to them as a mother; and, if so, in what respect; she answered that she treated them as kindly as if they had been her own children, and had nothing in her heart but to bring them up the best way, and did not think of any way in which she failed except in doing too much for them. No specific objection having been made to that portion of the second answer in which the witness stated what she had in her heart, *Held*, that no exception lay to the admission of these questions and answers. *Baldwin* v. *Parker*, 79.

13. A debtor who had given a sum of money to the administratrix of the estate of his creditor to apply to payment of the balance actually due from him to the intestate so much thereof as might be necessary, sued her individually to recover part of the amount applied by her, on the ground that it was in excess of the actual balance; and in support of his case proved errors in accounts rendered to him by the intestate in his lifetime. The defendant, notwithstanding these errors, relied on admissions of the plaintiff, both before and since the death of the intestate, that he owed such a balance as she applied. The plaintiff, in reply, being admitted without objection to testify as a witness in his own behalf as to matters since the appointment of the administratrix, was asked "when he first discovered what he claimed to be errors in the accounts." *Held*, that the question was competent in form, and not objectionable, under the Gen. Sts. *c.* 131, § 14, on the ground that it related to acts done prior to the appointment of the administratrix. *Cronan* v. *Cotting*, 334.

14. To identify the tag of a valise, oral evidence of words written on it is admissible, without producing the tag itself or proving its loss. *Commonwealth* v. *Morrell*, 542.

15. On the question of the amount of the property of a trader at a certain time, and to contradict his testimony which tended to show that it was then a certain sum, evidence is admissible of his declarations that at a former time it was a materially different sum, he having also testified that between the two

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times there was no particular change in his stock and he met with no serious loss. *Copeland* v. *Taylor*, 613.

16. On the trial of an action for money lent, evidence that the defendant had money in his possession at a certain time is inadmissible to corroborate his testimony that at a time soon afterwards he repaid the plaintiff. *Atwood* v. *Scott*, 177.

17. On the trial of an action for money lent on the alleged representation of the defendant that he could not pay rent and his landlord was about to sue for possession of the tenement, the defendant testified that he paid rent punctually and never had difficulty with the landlord. *Held*, that, to contradict him, and to show his want of means, the plaintiff might prove by the record of the court that just before the time of the alleged loan the landlord commenced such an action, in which the defendant appeared and consented to judgment against himself, and that no execution issued on the judgment. *Ib.*

18. The usage of a trader to withhold from his agents authority to sell goods on credit is immaterial, and so inadmissible, on the question whether he specially conferred such authority upon an agent who admits that it was not contained in his original contract of agency. *Bell* v. *Smith*, 617.

19. On trial of an action for assault and battery, a material witness for the defendant being asked on cross-examination, for the purpose of showing that he was under a bias against the plaintiff, whether he did not express satisfaction at the plaintiff's injuries and sing a derisive song under the plaintiff's window while the plaintiff was in bed suffering from them, denied that he had ever done anything of the kind. *Held*, that it was thereupon competent for the plaintiff to prove that, while he was in bed suffering from the injuries, the witness did twice sing such a song under his window, and that he heard the singing, and that the witness clapped his hands at the conclusion thereof. *McGuire* v. *McDonald*, 49.

20. In an action against a warehouseman for the rusting of the plaintiff's iron in his warehouse, a letter written by his servant (who had charge of the warehouse) to the plaintiff before the date of the writ, in which, after setting forth that there is a difference of opinion as to the condition of the iron, the writer proposes to allow to the plaintiff the amount of his claim in storage, on the ground that the writer is disposed to do what is just and right, deems it injudicious for either party to incur the expense of a lawsuit, and fears that if he should pay the claim "for a damage" it would involve him in trouble with his employer, is inadmissible in evidence as an admission of the defendant's liability. *Gay* v. *Bates*, 263.

21. Offers of a person to others interested in a claim against him, at interviews held with them "in relation to an adjustment" or "with a view to a settlement," to "leave out the matter in dispute," or to communicate information concerning the claim on condition that it should not be used against him in a lawsuit, are inadmissible in evidence in a suit on the claim. *Copeland* v. *Taylor*, 613.

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See ACCOMPLICE, 1, 2; ASSAULT; ATTACHMENT; BANK, 3; CONTRACT, 6, 7; DAMAGES, 4, 5; DEED, 1; DEPOSITION; EXCEPTIONS, 3, 7, 15; FRAUDULENT REPRESENTATIONS, 2, 3; HUSBAND AND WIFE, 2, 3; INSURANCE, 4–6; INTOXICATING LIQUORS, 1; LANDLORD AND TENANT, 1; LICENSE; MARRIED WOMAN, 2; NEGLIGENCE; PRINCIPAL AND AGENT, 1; PROMISSORY NOTE, 1, 4, 5; RAILER AND BRAWLER; TREES, 1; VERDICT; WAY, 1; WILL, 3–9.

EXCEPTIONS.

1. The thirty-second rule of this court, regulating the mode of establishing the truth of disallowed exceptions, applies to criminal equally with civil cases. *Commonwealth* v. *Wilson*, 427.
2. On the trial of a cause, whether criminal or civil, the decision of the presiding judge to grant or to refuse a motion for a continuance or postponement on account of the absence of a witness is not a subject of exceptions. *Commonwealth* v. *Donovan*, 425.
3. The provision of the Gen. Sts. *c.* 115, § 5, that "the courts shall not charge juries with respect to matters of fact, but may state the testimony and the law," does not restrain a judge from defining, in a charge to the jury, the degree of weight which the law attaches to a whole class of testimony, such as the testimony of accomplices, and leaving to the jury the application of the general rule to the circumstances of the case on trial; nor deprive the defendant of his right of exception, if the judge charges the jury that testimony of an accomplice against the defendant is corroborated by evidence which by the rules of law has not that effect. *Commonwealth* v. *Larrabee*, 413.
4. On a preliminary hearing, by the judge presiding at a criminal trial, of the circumstances under which confessions of the defendant, offered in evidence, were obtained, his direction to the prosecuting officer to conduct the examination of the witnesses, and refusal to permit the defendant's counsel to cross-examine them, afford no ground of exception. *Commonwealth* v. *Morrell*, 542.
5. In an action in which a count in contract is joined, under the Gen. Sts. *c.* 129, § 2, *cl.* 5, with a count in tort, it is within the discretion of the presiding judge to decide at what stage of the trial the plaintiff must elect on which count he will rely; and his decision is not a subject of exceptions. *Crafts* v. *Belden*, 535.
6. In an action of tort in the nature of trespass *quare clausum fregit*, the defendant set up in justification a license from the plaintiff through an agent, and offered in evidence an agreement under seal containing such a license, but executed by the agent in his own name; which, on the plaintiff's motion, was excluded as not binding on the plaintiff. The defendant was then permitted against the plaintiff's objection, to prove a previous oral agreement on the same subject between himself and the agent within the scope of his agency. *Held*, that if the oral evidence did not vary the effect of the writing the plaintiff had no ground of exception. *Merrick* v. *Plumley*, 566.

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7. Upon the hearing of a petition for a review on the ground of the discovery of new and material evidence, consisting of a paper admitted to have been written by the respondent, as to the contents of which he had testified at the trial, when it was supposed to be lost, the judge, after admitting evidence of the petitioners as to what that testimony was, refused to hear contradictory evidence of the respondent on the same subject, and ordered a review, "being of opinion that the facts found and admitted were such as required a review, whatever the evidence offered might be." *Held*, that such refusal was a good ground of exception to the order for the review. *Richardson* v. *Lloyd*, 475.

8. In an action for the value and hire of a chronometer delivered five years previously, on hire, to the master of a vessel, under a contract to return it at the end of a voyage from New York to Callao and back, on which the vessel was then bound, or within fourteen months, but with an option of purchasing it within six months from the date of delivery, the objections that there was no evidence at the trial that the voyage had come to an end or that the option of purchase had not been exercised, neither of which issues was specially made in the pleadings, are not open to the defendant at the argument of a bill of exceptions in which no question of law is raised in regard to them and the evidence thereon, if any, is not reported. *Negus* v. *Simpson*, 388.

9. On a trial, after the case had been committed to the jury and they had retired, the sheriff, by order of the judge on the plaintiff's motion, delivered to them a motion for an increase of the allegation of damages in the writ, which had been granted before the trial and the plaintiff had stated to them in his opening, and which they had accidentally omitted to take with them in retiring. *Held*, that the defendant had no ground of exception. *Smith* v. *Holcomb*, 552.

10. Whether or not the judge presiding at a trial will rule, at the defendant's request, upon the sufficiency of the plaintiff's evidence to maintain the action, before testimony is closed upon both sides, is a matter of discretion; and no exception lies to his refusal to do so. *Wetherbee* v. *Potter*, 354. *Smith* v. *First National Bank*, 605.

11. The refusal of the judge presiding at a trial to make a ruling upon a part only of the evidence, and which assumes that facts are fully established which such part has only a tendency to prove, is no ground of exception. *Howe* v. *Howe*, 88.

12. The decision of the presiding judge at a trial, upon the credibility of evidence of the loss of a written instrument, offered on a hearing preliminary to the introduction of secondary evidence of its contents, is conclusive, and not subject to exceptions. *Commonwealth* v. *Morrell*, 542.

13. The decision of the superior court, under the Gen. Sts. *c.* 129, § 29, to require the plaintiff, in any case pending therein, to procure an indorser, is not subject to exceptions. *Petitcler* v. *Willis*, 460.

14. No exception lies, if, in response to a prayer for a ruling of law at a trial, the judge adopts and gives to the jury the substance of the ruling prayed

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for, but declines to adopt and give illustrations of the application of it which were included in the prayer. *Townsend* v. *Pepperell*, 40.

15. A bill of exceptions to the refusal by the judge, at a trial, of a prayer for instructions to the jury framed on the assumption that a certain rule of law was applicable to the case, showed that he had already instructed them, without objection, that such rule was not applicable, but that another rule was so. To such evidence as was stated in the bill either rule was applicable; but the bill did not purport to recite the whole evidence. *Held*, that the exceptions must be overruled on the ground that it did not distinctly appear that the instructions prayed for were appropriate or pertinent. *Milk* v. *Middlesex Railroad Co.* 167.

See DAMAGES, 3; HUSBAND AND WIFE, 3; INSURANCE, 5, 8; LARCENY, 2; MORTGAGE, 6–8; TRUSTEE PROCESS, 5; WAIVER; WILL, 8–10.

EXCISE.

See TAX.

EXECUTION.

Before the St. of 1844, *c.* 107, took effect, land paid for and occupied by a debtor, the legal title to which he had never held, but had caused to be conveyed to a third person in order to secure it from his creditors, could not be attached or taken on execution as the debtor's property. And such grantee, if he was an infant too young to participate in the fraud, may maintain a writ of entry for the land against one of such debtor's creditors who has taken it on execution. *Hamilton* v. *Cone*, 478.

See HOMESTEAD, 1; MORTGAGE, 2, 3; TRUSTEE PROCESS, 6; WRIT OF ENTRY, 4.

EXECUTOR AND ADMINISTRATOR.

See COSTS, 2; INSURANCE, 2, 4; LIMITATIONS, STATUTE OF, 3; MONEY HAD AND RECEIVED, 1.

FACTOR.

See DAMAGES, 3.

FIRE INSURANCE.

See INSURANCE, II.

FIXTURE.

1. A stone sink, weighing two hundred or two hundred and fifty pounds, set, by the owner of a dwelling-house, closely against the walls, in a corner of one of the rooms, in a frame, under the spout of a wooden pump connected with a cistern of water below, (which pump soon afterwards was removed,) was used for washing dishes and other appropriate domestic work; the waste water being conducted from one end of it, by a lead pipe, through the side of the house, into a drain, until the pipe wore out, and being afterwards dipped out, or drawn off through a hole fitted with a stopple. *Held*, that it

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was not severed from the freehold by the removal of the pump and decay of the pipe, no change being made otherwise in its position or use; and passed to the heir as against the administrator, on the death of the owner of the freehold, intestate. *Bainway* v. *Cobb*, 457.

2. A cloth covering of the bed of a billiard table which can be removed without injuring the table is not so annexed thereto as to be inseparable by one who put it there under a contract of sale which he has a right to rescind. *Perkins* v. *Bailey*, 61.

FOREIGN ATTACHMENT.

See TRUSTEE PROCESS.

FOREIGN LAW.

When the evidence of a foreign law consists entirely of a judicial opinion, the question of its construction and effect is for the court; and if it is uncontradicted, and will not support the action, the jury should be so instructed. *Kline* v. *Baker*, 253.

See CARRIER, 1; FRAUDULENT REPRESENTATIONS, 3; INSURANCE, 8; JUDGMENT; TRUST, 5.

FRANCHISE.

See CORPORATION, 1; TAX, 1, 2.

FRAUD.

See ACTION, 2; ATTORNEY AND COUNSEL; CONTRACT, 4, 5; DEED, 5; EQUITY, 4, 7; EVIDENCE, 10; EXECUTION; FRAUDULENT REPRESENTATIONS; INSOLVENT DEBTOR, 2, 3; WILL, 5–8, 10.

FRAUDS, STATUTE OF.

1. An oral promise of a mortgagee of land, at the time of entering for foreclosure, that if he shall sell "the place" he will pay to the mortgagor whatever he shall receive for it beyond the amount due on the mortgage, is within the clause of the statute of frauds which provides that no action shall be brought upon any agreement that is not to be performed within one year from the making thereof, — Gen. Sts. *c.* 105, § 1, *cl.* 5. *Frary* v. *Sterling*, 461.

2. The seller of goods by an oral agreement for the price of more than fifty dollars shipped them from Philadelphia consigned to the buyer at Boston, where he left the bill of lading at the office of the buyer, who then and for more than a week afterwards was sick and absent in the country. A week after the bill of lading was thus left, the buyer's clerk wrote to him that it was in the office, which was his first notice of the fact. Prior to the day when he received the clerk's letter he had given the seller notice that he would not receive the goods, which notice he repeated on that day; and he answered the clerk without delay, directing him to return the bill of lading; and the clerk did so immediately, but after the goods had arrived at Boston. In the absence of any evidence that the clerk was authorized to receive and

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accept the bill of lading, *Held*, that there was no acceptance of the goods sufficient to take the case out of the statute of frauds. *Quintard* v. *Bacon*, 185.

3. A., B., C. and D. agreed to buy real estate jointly; C. and D. agreed to furnish the money for the purchase; and C. agreed with D. that the drafts for the purchase money should be drawn on D., and that he would reimburse to D. one half of what D. should pay thereon. All these agreements were oral. *Held*, that the promise of C. to reimburse D. was not within the statute of frauds, as a contract for the sale of lands. *Wetherbee* v. *Potter*, 354.

FRAUDULENT REPRESENTATIONS.

1. One who has been induced to sell and put on a billiard table a removable cloth covering by fraudulent representations of the vendee, who was in possession of the table, that he was the owner thereof, may rescind the sale and resume possession of the cloth, although he sold to the same vendee another table at the same time, and took from him a mortgage of both tables as security for the payment of the price of the second table and of the cloth and his labor. *Perkins* v. *Bailey*, 61.

2. Evidence that, at the time of the sale of an express which was run over the line of a railroad, the seller, having notice from the railroad corporation that on a certain day it would take back the privileges which it had allowed to expressmen over the road, in order to make such arrangements for the future as might be desirable, did not mention this to the purchaser, and represented to him that he could continue to run the express over the road, and would have no difficulty in making arrangements with the corporation for the purpose; but that the purchaser knew that the seller had no arrangement with the corporation which would prevent it from withdrawing at any time the privilege of running the express over the road; is not sufficient to sustain an action by the purchaser against the seller for false and fraudulent representations. *Putney* v. *Hardy*, 5.

3. In the sense of the rule in *Smith* v. *Smith*, 21 Penn. State, 367, and *Backentoss* v. *Speicher*, 31 Penn. State, 324, that, by the law of Pennsylvania, in order to constitute such fraud as will render a sale void, the buyer's intention not to pay the price and concealment of his own insolvency is not sufficient, but there must be "artifice, intended and fitted to deceive, practised by the buyer upon the seller," evidence that the manager of the buyer's business, in negotiating at the buyer's residence in Illinois with the seller's agent for the goods within ten days before the buyer sent his order for them to the seller in Pennsylvania, falsely represented that the buyer owned a farm of considerable value and had other means amply sufficient for carrying on his business, and always bought for cash, and did not owe any man, is sufficient to warrant a finding that the buyer's purchase of the goods, made immediately afterwards on a credit of sixty days, and his subsequent similar purchase from the same seller, made before that credit had expired, were fraudulent and passed no title to goods the sale of which was so induced. *Kline* v. *Baker*, 253.

See ACTION, 2.

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GOVERNOR.

See CONSTITUTIONAL LAW.

GUARDIAN AND WARD.

See WRIT OF ENTRY, 1.

HOMESTEAD.

1. A sheriff's sale on execution of the judgment debtor's right in equity to redeem mortgaged real estate, which the debtor claims to be exempt from levy as a homestead, is not invalid, under the Gen. Sts. *c.* 104, § 11, because not made expressly subject to the homestead estate. *Swan* v. *Stephens*, 7.
2. On trial of a writ of entry for possession of property of which the demandant is general owner subject to a homestead estate of the tenant which has not been set off to him, the burden is on the tenant to prove that the value of the property is such that his homestead right covers the whole of it. *Ib.*

See MORTGAGE, 1; WRIT OF ENTRY, 3.

HOSPITAL.

See EVIDENCE, 9.

HUSBAND AND WIFE.

1. A husband and wife may be jointly indicted on the Gen. Sts. *c.* 87, §§ 6, 7, and, upon sufficient proof, both convicted, of keeping a liquor nuisance. *Commonwealth* v. *Tryon*, 442.
2. Evidence that a wife, who lived with her husband in a building kept as an inn by him, and used for the illegal keeping and sale of intoxicating liquors, made such illegal sales in his absence, and in his absence declared that they did sell, is sufficient to warrant her conviction on a joint indictment with him for keeping a liquor nuisance. *Ib.*
3. A witness being asked, on cross-examination, whether at a certain date he had heard anything on a certain subject in a family of which he and his wife were members, the party proposing the question stated that he did not wish the witness, in answering, to name the conversation in which, nor the person from whom, he had so heard. The other party objected to the form of the question so far as it related to information derived by the witness from private conversations with his wife, unless he should be allowed to state the details of the conversation. The judge ruled that the witness could not testify to private conversations between himself and his wife, and that the question should be modified so as either to exclude information so derived, or not to confine the source of information to that family. *Held*, that there was no ground of exception to this ruling. *Baldwin* v. *Parker*, 79.

See ESTATE TAIL; EVIDENCE, 4; INSURANCE, 1, 8; LANDLORD AND TENANT, 5; MARRIED WOMAN; MORTGAGE, 1; PRINCIPAL AND AGENT, 1; TRUST, 5.

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INFANT.

See WRIT OF ENTRY, 1.

INSANITY.

On a trial of the issue whether during a certain period a woman was so insane as to be unable to choose a settlement, a party prayed for an instruction to the jury "that the insanity which they were to find need not be complete madness, but such a disordered or unsound state of mind that by reason thereof she needed the care and oversight of a parent or guardian, or was an unfit person to be married, or, if she were a man, would not have been a fit person to be intrusted with state or municipal offices or places of trust." The judge, having already instructed them that they were to consider whether, if her mind was diseased, it was so "to such an extent as to deprive her of her volition, free will and power of choice, so as to take away from her her self-control over her mind and herself in these particulars so that she had no power to make choice of a settlement," refused to adopt the instructions prayed for, but did instruct them further "that the insanity need not amount to complete madness, and, if they should find that the degree of mental derangement was such as was indicated in the prayer, it would be very proper evidence for them to consider upon the question whether or not she had that kind and degree of mental derangement which the court had already instructed them that they must find that she had." *Held*, that the instructions given were correct; and included the substance of that prayed for, with proper modifications. *Townsend* v. *Pepperell*, 40.

See BURDEN OF PROOF, 2; EVIDENCE, 7–12; WILL, 3–5, 8–10.

INSOLVENT DEBTOR.

1. A right of action of an insolvent debtor, on the Gen. Sts. *c.* 53, § 5, whether absolute or contingent, to recover threefold the amount of usurious interest paid by him, passes by an assignment of his estate in insolvency. *Tamplin* v. *Wentworth*, 63.
2. If the purchaser of goods sold by an insolvent debtor with a view to give an unlawful preference has reasonable cause to believe that such is the intention of the seller, the sale is void, although the benefit of the preference is to enure to a creditor who by reason of his innocence of the fraud can retain the payment so made upon his debt. *Crafts* v. *Belden*, 535.
3. In suing the buyer of goods sold by an insolvent debtor with a view to give an unlawful preference, if the assignee in insolvency joins a count in contract for the price of the goods with a count in tort for their conversion, in the manner permitted by the Gen. Sts. *c.* 129, § 2, *cl.* 5, that is no waiver of his right to rescind the sale, when it appears that all the counts were intended to disaffirm it; although before bringing the action he made a demand for the price, and although estate of the defendant is attached on the writ. *Ib.*

See BANKRUPT; EXECUTION; RECORD.

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INSURANCE.

I. *Life Insurance.*

1. A policy of life insurance, expressed, in accordance with the Gen. Sts. *c.* 58, § 62, to be for the benefit of the widow and child of the assured, cannot be affected by his will. *Gould* v. *Emerson*, 154.

2. If a policy of life insurance, expressed to be for the benefit of the widow and child of the assured, is made payable, upon his death, to his executor, the executor is liable to the child, as for money had and received to the child's use, for the child's share of the amount of the policy collected by him from the insurers, after deducting from such amount his expenses of collecting the same, including the expenses of taking out administration here if this was the only estate of the deceased in this Commonwealth. *Ib.*

3. An assignment by a wife to a creditor of her husband of a policy of insurance effected by her in accordance with the Gen. Sts. *c.* 58, § 62, or the N. Y. St. of 1866, *c.* 656, on her husband's life for a certain term, and, in event of his death after hers, made payable to their child, cannot affect the right of the child to the amount of the policy upon the death of the husband within that term after the death of his wife, although made with the assent of the husband and of the insurers. *Knickerbocker Insurance Co.* v. *Weitz*, 157.

4. A policy of insurance, effected by the assured on his life, and expressed to be payable, on his death, "to his heirs or representatives," is not expressed to be for the benefit of any third person within the meaning of the Gen. Sts. *c.* 58, § 62, but is payable to the administrator as assets of the estate of the deceased; and oral declarations of the assured, after receiving it, that he intended it for the benefit of his son, are inadmissible to vary its construction, and insufficient to raise a trust in respect to its proceeds. *Wason* v. *Colburn*, 342.

5. On the trial of an action upon a policy of insurance made payable to the plaintiff after due notice and proof of the death of the insured, the plaintiff, to show such notice and proof, called a witness who testified that he delivered to the insurers some affidavits together with some cuttings from newspapers and letters between persons not parties to the action. All of these the insurers produced; and the plaintiff put the affidavits in evidence, but declined to put in evidence the cuttings or the letters, and the judge refused to require him to do so, or to permit the insurers to do so themselves. *Held*, that the refusal was not a valid ground of exception, unless it plainly appeared that the insurers were prejudiced thereby; and that they were not so prejudiced, if the fact of the death of the insured was sufficiently shown, whether the affidavits alone, or all the papers together, were considered as the proof thereof furnished to them by the plaintiff. *Cluff* v. *Mutual Benefit Insurance Co.* 317.

6. On the trial of an action on a policy of insurance upon the life of the insured, made on condition that it should be void if he should die in the known violation of any law, the record of the trial and acquittal by a court

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of competent jurisdiction of a person who killed the insured is incompetent to prove that the condition was broken. *Ib.*

7. In a policy of insurance, the fact that it was made by a mutual company with one of its members upon his life gives to words used for a definite purpose and applied to transactions of a clearly defined character, such as a provision that the policy shall be void if the insured shall die in the known violation of any law, no significance different from what would be their fair construction in a similar contract between any parties. *Ib.*

8. On the trial of an action on a policy of insurance upon the life of the insured, made on condition that it should be void if he should die in the known violation of any law, evidence was introduced tending to show that he was killed while doing what would constitute either robbery or larceny unless he acted under a belief which would avoid the otherwise criminal character of his acts. *Held*, that instructions to the jury were erroneous which permitted them to understand that such a belief need not be a belief in his legal right to do the acts, but might be a belief in a right of self-redress by reason of the disturbed condition of the country, the inefficient administration of the laws, or otherwise. *Held, also*, on a new trial upon the same evidence, that the fact that the judge did not comply with a request to instruct the jury that the insured must be presumed to have known the civil law of the state where he was killed was not a valid ground of exception, if he did instruct them that the insured had no right to do the acts in the commission of which he was killed, and that he must be presumed to have known the criminal law of the state. *Ib.*

9. A policy of insurance, "for the period of twelve months" from noon of the day of its date to noon of the day of its expiration, was made "against loss of life" of the assured, in a sum payable to his widow on proof "that the assured at any time after the date hereof and before the expiration of this policy shall have sustained personal injury caused by any accident," "and such injuries shall occasion death within ninety days from the happening thereof." By an accident which happened at nine o'clock in the forenoon, the assured sustained personal injuries which occasioned his death about the same hour on the ninety-first day thereafter, excluding the day of date of the accident from the computation; the whole period being included within the twelve months. *Held*, that by no method of computation of time could the death be regarded as occurring within ninety days from the happening of the accident. *Held, also*, that the clause limiting the liability of the insurers to the occurrence of death from the injuries within ninety days from the happening of the accident was not inconsistent with the provision by which the insurance was expressed to be "for the period of twelve months;" nor could be construed to refer only to such injuries as should occasion death within ninety days after the twelve months. *Perry* v. *Provident Insurance Co.* 162.

II. *Fire Insurance.*

10. A policy of fire insurance provided, in one clause, that, "if the situation or circumstances affecting the risk" on the property insured should "be so

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altered or changed, by or with the advice, agency or consent of the assured, as to increase the risk thereupon," the policy should become void; and, in another clause, that, if the risk should "be increased by the erection of buildings, or by the use or occupation of neighboring premises, or otherwise," or if the insurers should so elect, the insurers might terminate the insurance after giving notice to the assured. *Held*, that the policy was avoided under the first clause, without any election on the part of the insurers, or notice from them to the assured, by the erection by the assured of a factory on an adjoining lot of land under circumstances affecting the risk on the insured property. *Allen* v. *Massasoit Insurance Co.* 160.

See TRUSTEE PROCESS, 5.

INTOXICATING LIQUORS.

1. On the trial of a complaint which alleges that on a day specified the defendant "was and is a common drunkard, having been at divers days and times since said day drunk and intoxicated by the voluntary and excessive use of intoxicating liquors," the evidence in support of the charge must be confined to acts of the defendant done on a single day. *Commonwealth* v. *Foley*, 499.
2. Under the Gen. Sts. *c.* 86, § 61, a purchaser of intoxicating liquors sold in violation of law, who, in settling mutual accounts with the seller, has credited him with the price thereof, may recover the amount of such credit as a balance due on the account upon which he allowed it. *Walan* v. *Kerby*, 1.
3. If a purchaser of intoxicating liquors sold in violation of law, in settling mutual accounts with the seller, credits him with the price thereof, and, receiving from him payment of the balance found due after such an allowance, gives him a receipt in full settlement of the accounts, such payment and receipt do not have the effect of an accord and satisfaction to bar an action to recover the amount so credited. *Ib.*
4. The foreclosure of a mortgage of land has the effect of a payment of the debt and makes absolute the title of the mortgagee, although the consideration of promissory notes which the mortgage was made to secure was the price of intoxicating liquors sold in violation of law. *McLaughlin* v. *Cosgrove*, 4.

See HUSBAND AND WIFE, 1, 2.

JUDGE.

A justice of the peace who is a student of law with the attorney of a judgment creditor, and receives some compensation for services in the office of such attorney, is not thereby disqualified to take the affidavit of the creditor required by the Gen. Sts. *c.* 124, § 5, to authorize the arrest of the debtor on execution; and it is immaterial that afterwards, by request of said attorney, he appears with the debtor's attorney at an adjournment of the debtor's examination, and states to the magistrate that the creditor's attorney consents to a continuance thereof. *Knight* v. *Sampson*, 36.

See EXCEPTIONS, 3; FOREIGN LAW.

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JUDGMENT.

In the suit, based on the N. Y. Rev. Sts. part 3, tit. 4, c. 8, art. 2, § 47, of a stockholder of a corporation chartered under the law of New York, against the corporation, for a violation of its charter in declaring and paying a dividend out of its capital stock, a decree of the supreme court of New York declaring the corporation dissolved is in excess of the jurisdiction of the court, and therefore entitled to no faith and credit in this Commonwealth as a judicial proceeding. *Folger* v. *Columbian Insurance Co.* 267.

See BANKRUPT; DIVORCE, 3, 4, 6–8; ESTOPPEL; TRUSTEE PROCESS, 6; WILL, 2; WITNESS, 4.

JURISDICTION.

See CORPORATION, 1, 2; EQUITY, 2, 3; JUDGMENT.

JURY.

See EXCEPTIONS, 3; FOREIGN LAW.

LACHES.

See TOWN, 4.

LANDLORD AND TENANT.

1. A written lease of a house, at a certain rent per annum, payable "in monthly payments, or otherwise *pro rata*," for a term to begin "when said house is suitable to be occupied" by the lessee, and undefined in duration except by a stipulation that if, after two years from the time when the lessee should move into the house, the lessor should wish to live there, he might do so, and the lessee might then retain, if he should desire, certain rooms "for such a term as may be agreeable to us both," creates only a tenancy at will; and parol evidence is inadmissible to give it a different construction. *Murray* v. *Cherrington*, 229.

2. A tenant claiming under an oral lease from a tenant at will is not estopped from maintaining an action of tort in the nature of trespass *quare clausum fregit* for his eviction from the tenement by one claiming under a subsequent written lease from such tenant at will. *Hilbourn* v. *Fogg*, 11.

3. If a tenant at will underlets and surrenders possession to his undertenant, notice to the latter of a subsequent written lease for years from the owner, and to quit forthwith, is sufficient to sustain an action brought against him twelve days afterwards by the lessee for years for possession of the premises. *Clark* v. *Wheelock*, 14.

4. A grantee of real estate is not estopped from maintaining an action on the Gen. Sts. c. 137, for possession, against one who was in occupation of the premises as tenant at will at the time of the conveyance and neglects to deliver them up notwithstanding notice thereof, by his serving two notices upon the tenant before bringing the action, the first purporting to determine an

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invalid lease of the premises for a term of years by the previous owner to the tenant, and the second to quit for nonpayment of rent. *Melley* v. *Casey*, 241.

5. A tenant in possession cannot hold over after the expiration of his term, under a claim of title to the premises in his wife, although he has cohabited with her there during the term. *Miller* v. *Long*, 13.

6. A lessee for years, who had underlet parts of the leased premises, and then had suffered his landlord to obtain judgment against him for possession, and possession to be delivered under the judgment, and had surrendered and cancelled his lease, assented in writing to a subsequent assignment of one of the underleases by the undertenant. *Held*, that he could not maintain an action against the assignee for the subsequent "use and occupation of the premises according to the terms of the covenants of said [under] lease;" although the object of all the proceedings concerning the judgment and possession obtained by the landlord, and of the surrender and cancelling of the original lease, was merely to eject an objectionable undertenant of another part of the premises; and although the landlord suffered the plaintiff to remain in occupation of part of them. *Grundin* v. *Carter*, 15.

See LEASE; MARRIED WOMAN, 4–6.

LARCENY.

1. If goods of a master fraudulently appropriated by his servant were, at the time of such appropriation, in the possession of the master, whether actual or constructive, although in the custody of the servant, the crime is larceny. *Commonwealth* v. *Berry*, 428.

2. On the trial of an indictment for an attempt to steal a pocket-book from the person, the evidence showed that a police officer, seeing the defendant put her left hand into the pocket of another woman, grasped the wrist of that hand; and that the defendant then raised the hand in and with the pocket, and let it fall again suddenly, tearing the pocket, when the pocket-book fell to the ground. *Held*, that there was no ground of exception to the refusal of the judge to rule that on this evidence "there was a sufficient caption and asportation to constitute larceny," and to his instructing the jury that "if they were satisfied, beyond a reasonable doubt, that the defendant's hand had been thrust into the woman's pocket with a felonious intent, and was arrested in the pocket while attempting to execute that intent, and before it had reached or disturbed the pocket-book, they might find her guilty of the offence charged in the indictment." *Commonwealth* v. *Luckis*, 431.

See EMBEZZLEMENT.

LAW AND FACT.

See EXCEPTIONS, 3; FOREIGN LAW.

LEASE.

1. D. & P., copartners, were lessees of a parcel of real estate. P. with D.'s assent gave C. an underlease of part of it, (described as a store of a certain

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number on a certain street,) drawn in the names of both D. and P., but signed by P. only, for the balance of their term, and containing the following covenant: "The lessors promise to renew said indenture for such further term as their leasehold estate in the premises may be renewed or extended." C. entered into possession, and paid rent to D. & P. till the dissolution of the copartnership, when D. assigned to P. all his interest in the original lease; and thereafter C. paid rent to P. alone. At the end of the term, the owner of the whole estate agreed to give a new lease thereof for a shorter term at an increased rent to P. with a surety; and P., in consideration of the agreement of S. to become his surety, gave S. an underlease of the store for the new term. S. took it knowing that C. was in possession as a tenant, but without actual knowledge of the covenant of renewal above quoted, formal notice of which was, however, served on him by C. before the owner executed the new lease to P. After receiving the new lease, P. refused the demand of C. for a renewal; and reëxecuted his underlease to S. *Held*, that the effect of the assignment by D. to P. of all his interest in the original lease was to confirm the underlease to C. and render it as perfect as if it had been signed originally by D. with P. *Held, also*, that the covenant of renewal therein was not void for indefiniteness; and that, notwithstanding the transactions between P. and S., C. was entitled to a renewal at the same rent and with the same covenants, except the covenant of renewal, for the whole of P.'s new term. *Cunningham* v. *Pattee*, 248.

2. A recorded lease of land by T. for eight years, for a rent payable quarterly, provided that all buildings which the lessee should erect on the land should be appraised at the end of the term, and the appraised value be paid by the lessor or her successors or assigns to the lessee or his assigns; or that the lessor or her representatives might allow the lessee to retain the premises "till said sum without interest is realized by the lessee at the rent stipulated;" or might, at any time after part of said sum had been liquidated, pay the balance and resume possession. After erecting buildings on the land, the lessee, by an assignment never recorded, conveyed to F. all his title; and T. conveyed all her title to her sons, taking back a lease of the premises for her life with "power to underlet" them. At the end of the eight years T. made to F. a new lease of the premises for ten years for the same ground-rent, describing him as the assignee of the first lease, and containing a similar provision concerning the ultimate disposal of the buildings. No appraisal was then or ever made of the buildings; nor did F. ever reserve any part of the rent, but paid it to T. until she died. At her death, five years only of the term of ten years had expired. One year afterwards, her sons, having meanwhile received from F. payment of the rent each quarter, conveyed all their title to D., "subject to the rights and incumbrances, if any, belonging to or created by the tenants now on said premises." D. received the reconveyance without notice, other than such as may be inferred from the record of T.'s lease to F., that F. was the assignee of the original lessee, and, after giving F. notice of said conveyance and to quit, evicted him

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from the premises and tore down the buildings. *Held*, that the provision in the original lease concerning a holding after the expiration of the eight years created a tenancy for years, which was not surrendered by the making of the second lease, and which continued after the second lease was concluded by T.'s death; and that F. was entitled to recover from D. a sum equal to what was the value of the buildings at the end of the eight years, less the amount of the rent from that time to the time of his eviction. *Flagg* v. *Dow*, 18.

3. The owner of a house leased it for a year on condition that the lessee should pay rent monthly in advance, board him and his family at her expense, and board his servant at a rate to be agreed. Upon his demand for payment of rent for the second month of the term, when due, she asked for "allowances," first for boarding his servant, next his visitors, and finally himself and his family, each of which he refused to make. On his refusal, she refused to pay rent or furnish board, and sued him on an account for board furnished for him and his family, as well as for his servant and visitors. While this action was pending, he peaceably dispossessed her of the house; and she sued him thereupon in trespass. In these actions, tried together, *Held*, that she might recover the value of the board of his servant and visitors; but that he was warranted in so dispossessing her for breach of the condition of the lease. *Morrill* v. *De la Granja*, 383.

See LANDLORD AND TENANT; MARRIED WOMAN, 4–6.

LICENSE.

In an action of tort by a married woman for quarrying and carrying away stone from her land, evidence that she saw the stone (which was quarried within fifty rods from her dwelling-house) carried by her door from time to time during a year, knowing that the defendant supposed himself to have a license to quarry and remove it, is competent evidence of a license from her to him to do so. *Merrick* v. *Plumley*, 566.

See EXCEPTIONS, 6.

LIEN.

See CONTRACT, 3; TAX, 4.

LIFE INSURANCE.

See INSURANCE, I.

LIGHT AND AIR.

See EASEMENT, 3.

LIMITATIONS, STATUTE OF.

1. Whether the legislature has a right, under the Constitution, to give an action for the recovery of a debt already barred under a general statute of limitations, by a statute passed after the bar is complete, *quære*. *Ball* v. *Wyeth*, 338.

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2. The statute of limitations, Gen. Sts. c. 156, §§ 1, 6, is not a bar to an action brought in this Commonwealth by a foreigner within six years after coming for the first time to the United States, for breach of a promise of marriage made to her twenty years previously in her native country. *Goetz* v. *Voslinger*, 504.

3. The receipt by an administrator of the proceeds of real estate included in his inventory, sold by leave of the probate court to pay debts and charges more than two years after the time of his giving bond; and of rents accruing on the real estate up to the time of the sale; is not a receipt of new assets on account of which he is liable to an action by a creditor of his intestate, which is otherwise barred by the Gen. Sts. c. 97, § 5. *Alden* v. *Stebbins*, 616.

See EQUITY, 4, 7.

LOST ARTICLE.

See EVIDENCE, 14; EXCEPTIONS, 12.

MAIL.

See PRINCIPAL AND AGENT, 2, 3.

MARRIAGE SETTLEMENT.

See ESTATE TAIL; TRUST, 5.

MARRIED WOMAN.

1. In an action by a married woman, it is not necessary to allege her right to sue as such in the writ or declaration. *Hubert* v. *Fera*, 198.

2. Evidence that a married woman, at the time of buying articles of apparel for her own wear, told the seller to charge them to her and promised to pay for them out of her separate estate, is sufficient to sustain an action by him against her personally, under the Gen. Sts. c. 108, §§ 1, 3, for the price of the goods. *Labaree* v. *Colby*, 559.

3. A promissory note, made to a wife in consideration of the sale by her husband of his interest in a partnership of which she furnished the pecuniary capital, is her separate property, and not attachable by trustee process against her husband, in the absence of fraud. *Worthy* v. *Clapp*, 561.

4. A lease of real estate by a married woman for a term exceeding one year, without the assent of her husband in writing, or his joining in the conveyance, or the consent of a judge, as provided in the Gen. Sts. c. 108, § 3, is not void merely for the excess above one year, but is void altogether; nor does it become valid by the express exception of it from the covenant against incumbrances in a subsequent warranty deed of the premises by her and her husband to a third person; nor by her assignment of it afterwards to such third person with the written assent of her husband. *Melley* v. *Casey*, 241.

5. The assent of the husband required by the Gen. Sts. c. 108, § 3, to render valid a lease by his wife of real estate for a term exceeding one year, is an

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assent contemporaneous with the execution of the lease, and delivered or communicated as an operative part of it. *Ib.*

6. A husband, having taken a lease of a shop from the owners with an understanding that he should underlet it to his wife for her separate business, admitted her to the occupation of it and took rent from her as his tenant; and she continued such occupation for her separate business after the determination of his lease by a sale of the premises. *Held*, that he, and not she, was liable to the grantee of said lessors, in an action under the Gen. Sts. *c.* 90, § 25, for such continued use and occupation as a tenant at sufferance. *Knowles* v. *Hull*, 562.

See HUSBAND AND WIFE; INSURANCE, 3; TRUST, 5.

MASTER AND SERVANT.

Although a servant has the custody of goods which he receives from his master to use for a specific purpose, the possession remains in the master. *Commonwealth* v. *Berry*, 428.

See EMBEZZLEMENT; LARCENY, 1.

MEMORANDA.

Appointments of Chief Justice Chapman and Mr. Justice Colt, 100.

MILL AND MILL PRIVILEGE.

1. A mill-owner is not liable under the mill act, Gen. Sts. *c.* 149, for any injury done to intervening land by letting down water from his reservoir dam for the use of his mill, for which he would not be liable at common law. *Drake* v. *Hamilton Woolen Co.* 574.

2. If the owner of a mill and a reservoir dam on the same stream renders intermediate land wet and less valuable for cultivation, by letting down water from the dam in the dry season of the year, he is not liable in damages, if the water which he lets down is reasonably necessary for the use of his mill, and does not increase the volume of the stream beyond its usual limit, or overflow its natural channel; nor is liable in damages for flowage if the water which he lets down, and which, if unobstructed, would not flow the intermediate land, does flow it by filling a pond which is raised by the dam of another mill-owner who has a right to flow it by that dam at all seasons of the year. *Ib.*

3. The owner of a mill on a stream who has a right to draw down from his reservoir more or less than the natural flow of the stream, at his pleasure, to work his mill, is entitled to relief in equity against the owner of an intermediate dam which delays the passage of the water by the time necessary to fill the defendant's pond, and by its leaky condition allows the water to run so to waste, when the plaintiff's mill is not at work, as to make it necessary to fill the pond from day to day. *Brace* v. *Yale*, 488.

4. If the use of the water of a stream in its natural flow would be of no value to the owner of a mill situated between the reservoir and the mill of another

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who has a prescriptive right to draw from the reservoir, for the purpose of working his mill, more or less than such natural flow at his pleasure, the former is not entitled to relief in equity against the latter for making a different use of the water, by raising and tightening his dam and by different machinery at his mill, from that which he made while gaining his prescriptive right. *Yale* v. *Brace*, 488.

5. Under the mill act, Gen. Sts. *c.* 149, the proprietor of a mill on a stream may raise his dam so as to use all the unappropriated water power, even if he thereby causes water of his pond to flow into the raceway of a mill higher on the stream. *Dean* v. *Colt*, 486.

6. If the proprietor of a mill on a stream, who has lowered his wheel-pit so that by lowering the wheel he might use unappropriated water power, continues to use his wheel as before, and shows no intention to lower it, the proprietor of a mill lower on the stream may appropriate such power, provided that he does not injure the upper mill as it exists; and is not estopped by the fact that the proprietor of the upper mill holds under him by deed of warranty. *Ib.*

7. A deed of warranty by which A. conveyed a mill to B. gave B. a right to take and use the water that supplied the motive power; described the original location of the canal, a hundred rods long, which conducted the water from a stream to the mill; and specified the position of a weir and waste gate in the canal, used to empty on part of A.'s adjoining land the gravel with which it occasionally became obstructed. But this location had been changed by A. so that part of the canal was on land of a railroad. After the conveyance, A., to make a head of water for another mill which he owned lower on the stream, built a dam which raised water against the bank of the canal and the weir and gate. *Held*, that, even if A. was authorized by the mill act, Gen. Sts. *c.* 149, to thus raise the water, provided that it did not injure the canal, yet, if it weakened the bank of the canal so as to make it an unsafe conductor of water and to render repairs reasonably necessary, or if it obstructed the proper use of the weir and gate, B. was not restricted to the mill act for a remedy, but the canal and weir and gate were so far a part of his mill that he might maintain an action at common law for the injury. *Held, also*, that if B.'s right to empty the canal upon the adjoining land was a mere easement, subject to which A. had a right to flow the land, A. was entitled to reasonable notice of B.'s intention to use the weir and gate, and to an opportunity to draw down the water so as to allow such use, before being liable to an action for obstructing it. *Held, also*, in such an action, that the change of the location of the canal by A. before his conveyance to B., and the subsequent purchase by A. of the land of the railroad included in the new location, were immaterial. *Held, further*, that B. had no right to change the position of the weir and gate so as to empty the canal upon a different part of A.'s land. *Dean* v. *Colt*, 480.

MINOR.

See WRIT OF ENTRY, 1.

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MISTAKE.

The owner of a lot of forty-five acres of woodland, bought by him under a mistake as to its location, which mistake he had not discovered, stated, in negotiating a sale of it, that it was situated in the town of S., was all dry land and almost all accessible to teams, and would cut from fifteen to eighteen cords of wood per acre; when in fact it was situated in the town of G. B., a hundred and thirty rods from the boundary of S., included a swamp more than an acre in area and some ledges of rock inaccessible to teams, and would cut in no part more than fifteen cords of wood to the acre, and in some parts not more than five cords. He further represented that it adjoined a good wagon road and a cleared field, and showed to the buyer's agent a tract of six or eight acres as belonging to it, which adjoined such a field and a public highway; when in fact it did not include this tract, and no part of it adjoined a cleared field, or any road except a wood road. Under the influence of these misrepresentations the sale was completed by the buyer's giving his note for the purchase money and taking a deed of the lot on the face of which there was nothing to show that the land shown was not identical with the land conveyed. He would not have made the purchase if he had known the truth about the land; and, upon discovering it, he offered to reconvey the lot to the seller, and demanded a return of his note; with which demand the seller refused to comply, and put the note in suit. *Held*, that the buyer was entitled to a perpetual injunction on the seller against prosecuting the action on the note; although the misrepresentations of the seller were made without the purpose of deceit, and the deed he gave was a mere deed of quitclaim without any covenant of title or warranty. *Spurr* v. *Benedict*, 463.

See CONTRACT, 4, 5.

MONEY.

See TRUST, 5.

MONEY HAD AND RECEIVED.

1. A debtor transferred to the administratrix of the estate of his creditor acceptances of a third person with directions to apply the proceeds, or so much thereof as might be necessary, to discharge his indebtedness to the deceased. The administratrix brought suit on the acceptances in her representative capacity, recovered judgment, and out of the proceeds of the execution applied to the estate of the deceased a sum larger than was actually due from the debtor. *Held*, that she was responsible to the debtor in an action against her individually for the balance so misapplied, as money received by the defendant to the plaintiff's use. *Cronan* v. *Cotting*, 334.
2. A. executed an invalid deed, conveying his money, which was in B.'s possession, to B., C. and D., to invest and hold on certain trusts. B. paid the money to C. in presence of D., who advised and acted with B. and C. in the future administration of the trust but never had possession of any part of the

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fund. *Held*, that D. was not liable to A. for the fund as for money had and received by him to A.'s use, in the absence of fraud on his part and of any agreement by him to be jointly responsible with the other trustees. *Stowe* v. *Bowen*, 194.

MONEY LENT.

See ACTION, 1; EVIDENCE, 16, 17.

MONEY PAID.

See PLEADING, 3.

MORTGAGE.

I. *Of Real Estate.*

1. In a mortgage of real estate, the only effect of a release by the mortgagor and his wife of all right of homestead in the mortgaged premises is, to subject the homestead, together with the residue of the estate, to payment of the mortgage debt. *Swan* v. *Stephens*, 7.
2. The sale on execution, under the Gen. Sts. *c.* 103, § 39, of the judgment debtor's "right of redeeming mortgaged land" does not pass any interest, not covered by the mortgage, which he has in the land, and of which he retains the legal title. *Laflin* v. *Crosby*, 446.
3. A judgment debtor, owning the fee of land, mortgaged a life estate therein. His right of redeeming the mortgaged premises was taken and sold on execution, under the Gen. Sts. *c.* 103, § 39. *Held*, that the sale did not cover his reversion in fee after the life estate. *Ib.*

See COLLATERAL SECURITY; DEED, 8; EQUITY, 1, 6; FRAUDS, STATUTE OF, 1; HOMESTEAD, 1; INTOXICATING LIQUORS, 4.

II. *Of Personal Property.*

4. The delivery of the mortgaged chattels to the mortgagee, required by the Gen. Sts. *c.* 151, § 1, to render valid against third persons an unrecorded mortgage, is such a delivery as would be necessary in case of an absolute sale of those chattels. *Wright* v. *Tetlow*, 397.
5. As against the title of a third person to chattels embraced in an unrecorded mortgage, it is sufficient, under the Gen. Sts. *c.* 151, § 1, if they are delivered to the mortgagee before, and actually retained by him until, the accruing of such title. *Ib.*
6. On a trial of the title of a mortgagee to two unfinished steam-engines as against an attaching creditor of the mortgagor, there was evidence in behalf of the mortgagee tending to show that, at the time of executing the mortgage, (which was never recorded,) the mortgagor went with him through the workshop where the mortgaged property, consisting of numerous pieces, some of them of great bulk and weight, were scattered in different rooms, and showed him the various pieces, for the purpose of formally delivering them to him; that the mortgagor's clerk gave him a receipt for the mortgaged property, in which the clerk agreed to hold it for him, and to deliver it to him on

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demand, without any expense of storage or keeping; that, pursuant to an arrangement with the mortgagee, the mortgagor continued to work on the engines and had nearly finished them when he became insolvent; that during all this time there was no access to the shop except through the counting-room, (where the clerk was in the daytime, except on Sundays,) or through a gate which was fastened inside and was in full view from the counting-room; that every night the clerk left the premises in charge of a watchman employed and paid by the mortgagor, and on Sundays locked them up; that, when the messenger came to take possession of the property of the mortgagor under a warrant in insolvency, the clerk told him that he was keeping the engines for the mortgagee, and accepted from him a deputation as keeper of all the property of the mortgagor, without any schedule thereof, supposing that the messenger took or could hold only the other property in the shop; and that the clerk continued to hold the engines until they were taken by an officer on a writ of replevin in favor of the creditor of the mortgagor against the messenger, and then became keeper under the officer until the latter delivered the engines to the creditor. There was contradictory evidence, in behalf of the creditor, on some points; and, among others, whether the deputation of the clerk as keeper under the messenger included the engines. And there was evidence in behalf of the creditor tending to show that, when the officer came to take the engines on his writ, the clerk refused to surrender them without an order from the messenger. The judge refused to rule that the clerk, by giving up the engines to the officer, and afterwards becoming keeper under the officer, ceased to retain them for the mortgagee as required by law; or that, if the clerk surrendered them to the officer upon an order from the messenger, there was not such a retaining of possession; or that such retaining ceased when the clerk became keeper under the messenger; or that on all the evidence there was no such taking and retaining of possession by the mortgagee as to entitle him to the engines; but submitted that question to the jury, with instructions that, if the clerk became a keeper for the officer and held for him without making any claim or giving notice of any claim in behalf of the mortgagee, and only insisting that he would not allow the engines to go into the officer's hands except on the messenger's order, it would be evidence tending to show that the clerk was not then keeping them for the mortgagee; and that, in order to return a verdict for the mortgagee, they must find that he had an actual possession of the engines, which was not purposely kept secret; under which they were kept secured as such property should be secured under ordinary circumstances; to which the possession of the mortgagor for the purpose of finishing them was subordinate; which began before and continued when the messenger came to the shop to take possession of the property of the insolvent; and which the clerk never knowingly or actually surrendered to the messenger, making no claim and giving notice of none in behalf of the mortgagee; and that, if the clerk, as agent of the mortgagor and in his behalf, was in actual possession of the engines at and just before the coming of the messenger, any

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previous remissness on his part would be unimportant. *Held*, that the attaching creditor had no ground of exception. *Ib.*

7. On a trial of the title of a mortgagee of chattels under an unrecorded mortgage, an instruction to the jury that, if the mortgagee took and maintained such possession of them as a deputy sheriff is required to keep in case of an attachment of like property, it would be sufficient to render the mortgage valid against a third person, is correct; and, if it does not appear that any explanations of the requirements of keeping by an attaching officer were asked for, there is no ground of exception to the judge's omission to give them. *Ib.*

8. On a trial of the issue whether there was such a delivery to the mortgagee, and retention by him, of chattels embraced in an unrecorded mortgage, as to render the mortgage valid against third persons, the admission in evidence of policies of insurance on the chattels, obtained by the mortgagor in favor of the mortgagee as part of the original transaction, is no ground of exception, if it does not appear that they were allowed any weight or effect upon the question of delivery. *Ib.*

9. Personal property subject to a mortgage and remaining in the possession of the mortgagor was attached in an action against the mortgagor, and the mortgagee was summoned therein as trustee. The mortgagee served on the officer a written statement of the debt for which the property was liable to him, and demanded payment thereof. Within ten days afterwards the attachment was abandoned; but after such abandonment the officer forcibly resumed possession. *Held*, that the mortgagee might replevy the property from the officer, although the issue of the validity of the mortgage, which was raised in the action against the mortgagor, on the question of charging the trustee, remained undetermined. *Boynton* v. *Warren*, 172.

See FRAUDULENT REPRESENTATIONS, 1.

NEGLIGENCE.

Forty laborers were clearing ice from one to four inches deep from the double track of a street railroad lawfully located in the middle of a public way in Boston which was forty-two feet wide and much frequented for purposes of business. The way had not been closed to travel, nor any notice given that it was not open to general use. One of the laborers, using a pickaxe, was stooping so that he did not perceive the approach of a heavily loaded wagon drawn by one horse driven at a walk eight feet from the nearest sidewalk, until, hearing a noise, rising, and turning partly around, he found himself in a space a foot and a half wide between it and another loaded wagon which was being driven slowly in the opposite direction. He immediately called to the driver of the first wagon, who was sitting on the load, to stop, and made an effort to extricate himself, and simultaneously was struck by one of the hind wheels of that wagon, and injured. *Held*, that the question whether he was in the exercise of due care at the time of the injury was for the jury. *Quirk* v. *Holt*, 164.

See ACTION, 3–5; BANK, 3, 4; CARRIER, 6; TOWN, 4; TRESPASS; WAY, 4.

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NEW TRIAL.

See SEWER, 4.

NEXT FRIEND.

See WRIT OF ENTRY, 1.

NOTICE.

See CARRIER, 4; CONTRACT, 1, 2; EASEMENT, 2; INSURANCE, 5, 10; LANDLORD AND TENANT, 3, 4; LEASE, 1; MILL AND MILL PRIVILEGE, 7; RECORD.

NUISANCE.

See ACTION, 5; TREES, 2.

OATH.

See OFFICER, 2.

OFFICER.

1. A vote of the selectmen of a town appointing a person "on police duty" is a sufficient appointment of him as a police officer, under the Gen. Sts. *c.* 18, § 38. *Commonwealth* v. *Cushing*, 592.
2. A police officer appointed by the selectmen of a town under the Gen. Sts. *c.* 18, § 38, need not be sworn to the faithful discharge of the duties of his office. *Ib.*
3. An officer who serves a warrant addressed to him by a collector of taxes, substantially in the form prescribed by the St. of 1785, *c.* 50, § 6, (Rev. Sts. *c.* 7, § 33; Gen Sts. *c.* 11, § 39,) directing him to collect from a person named a certain sum due as his portion of a certain tax, "whereof said person has neglected to make payment and thereof is delinquent," is not liable in damages to the delinquent taxpayer on the ground that it does not appear on the face of the warrant that it was issued in the due and lawful exercise of a power or jurisdiction conferred by law. *Sherman* v. *Torrey*, 472.

See ATTACHMENT; BAILMENT; TOWN, 1, 2.

ORDINANCE.

See WAY, 3.

PARTIES TO ACTIONS.

See PLEADING, I.

PARTNERSHIP.

1. Three sons took from their father a conveyance of all his estate, real and personal, consisting of a farm, farm-house, farming stock and household fur-

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niture, and promised, in consideration thereof, to pay his debts then existing and support him and his wife during their lives. One of them took from the others a power of attorney to hold and manage the property and fulfil their joint promise, and by virtue of this power paid his father's debts, supported his father and mother till they died, and carried on the farm, supposing that if it should yield a profit over these expenditures they should share it equally, but if otherwise, that they should equally share the loss. *Held*, that, if any partnership was created between them, it was, at most, in the profits and losses of carrying on the farm. *Howe* v. *Howe*, 71.

2. Three common carriers ran lines of steamboat or railroad transportation, each covering a part only of a certain route, which formed together a continuous line of through transportation of goods over that route. A rate of freight fixed by mutual agreement was charged for the through service, collected by the carrier whose line included the end of the route, and divided between the three in an agreed proportion. *Held*, that no partnership or joint liability to shippers of goods was created by these facts. *Gass* v. *New York, Providence & Boston Railroad Co.* 220.

3. Six persons signed an instrument reciting that, desiring to obtain and work a gold mine, they appointed one of their number to go to California and select a mine, which, if his recommendation should be satisfactory, they would contribute equally to buy and work under his superintendence, at a salary to be fixed; and agreeing to contribute a hundred dollars each to pay his expenses to California. He was also orally assured that he should be reimbursed for his expenses over five hundred dollars, which amount his associates paid to him in equal sums; and he took with him to California a letter of instructions signed "for subscribers to agreement" by one of the five, who afterwards wrote a letter to him in the name of the "Company," abandoning the project on the ground that his recommendation was not satisfactory. Both of these letters purported to direct and advise him in behalf of the five, but contained expressions recognizing his association with them as well as his agency. *Held*, that he could not maintain an action at law against his associates jointly, for his services and expenses as agent under the original instrument. *Duff* v. *Maguire*, 300.

See LEASE, 1; PLEADING, 3.

PATENT.

One appointed by the patentee of a machine, although for a valuable consideration and by an instrument in terms irrevocable, to be his "sole agent for the manufacture and sale" of such machines in this state, and to retain a commission on the proceeds of sales in compensation for his services, and pay to the patentee the balance after reimbursing to himself the cost of manufacturing and selling, cannot maintain a bill in equity for an injunction on the patentee, or his subsequent assignee of the patent right, against here manufacturing and selling machines under the patent. *Kempton* v. *Bray*, 350.

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PAUPER.

See DOMICIL.

PAYMENT.

1. The buyer of goods sent to the seller the draft of one third person on another for their price, with a request to pass it to the buyer's credit; and the seller, after obtaining the acceptance of the drawee, replied that it should appear to the buyer's credit when paid. At its maturity the seller surrendered it to the drawee, taking in exchange his check upon a bank. The drawee failed before the check could be collected in the ordinary course of business; no notice of dishonor or protest of the draft was ever given to the drawer; and the seller presented the check as a claim against the drawee's estate in insolvency. *Held*, that the seller could not maintain an action against the buyer for the price of the goods. *Whitney* v. *Esson*, 308.

2. To pay an assessment laid on his shares in a corporation, the payee of two checks drawn on banks by third persons, payable to his order, for an amount exceeding in the aggregate the amount of the assessment, but neither check alone being equal thereto, indorsed the checks to the treasurer of the corporation, and said that they were "all right;" and the treasurer gave him a receipt for the assessment and paid him the balance in money. One of the checks was good when the payee took it, ten days before; but on the day when it was thus indorsed the drawer had failed, which the payee did not know till two days afterwards. The treasurer deposited the checks in bank for collection, and this one was returned in regular course of business, payment thereof having been refused. It was not protested, nor was any formal notice given to charge the payee as indorser; but four days after it was thus returned the treasurer sent it to the payee at his place of business in the same city, with a request for him to make it good, with which he refused to comply. *Held*, that the assessment was not fully paid. *Small* v. *Franklin Mining Co.* 277.

See EVIDENCE, 16; INTOXICATING LIQUORS, 2–4; PRINCIPAL AND AGENT, 3; USAGE.

PHYSICIAN.

See EVIDENCE, 9; WILL, 3, 4.

PLEADING.

I. *Parties.*

1. A cargo of coal was ordered from a mining corporation directly through its treasurer, and was shipped in the name of the corporation directly to the buyers as consignees. At the time of receiving the order, the treasurer told the buyers that certain parties were the selling agents of the corporation, of which fact the buyers had other information also; and he afterwards told the agents that he had obtained the order for them. The bill of lading

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of the coal was forwarded through the hands of the agents, who sent it to the buyers with a bill for the price of the coal as due to themselves, which bill the buyers did not return for ten days; and, on receiving the bill of lading, the agents insured the coal in their own name, and, according to their usual course of business in sales made by themselves, credited the corporation with the price of it, and charged the corporation with a guaranty commission. *Held*, that the agents could not maintain in their own name an action for the price of the coal. *Borrowscale* v. *Bosworth*, 378.

See EQUITY, 5; INSOLVENT DEBTOR, 1; MARRIED WOMAN, 1; WRIT; WRIT OF ENTRY, 1.

II. *Declaration.*

2. A., having ready for delivery in a bonded warehouse in a city a certain quantity of oil of a particular kind, made a contract with B. to deliver to B. for an agreed price such a quantity of oil of that kind in such a warehouse in that city during a certain month at buyer's option on ten days' notice within the month. About ten days before the end of the month, B. employed a broker to sell the oil thus contracted for, who sold it to A. for a price less than the price agreed in the original contract. *Held*, that A. might maintain an action against B. on a count upon an account annexed in which he charged B. with the price agreed in the original contract, and credited him with the price for which the oil was resold by the broker. *Warden* v. *Marshall*, 305.

3. A., B., C. and D., agreed to buy real estate jointly; C. and D. agreed to furnish the money for the purchase; and C. agreed with D. that the drafts for the purchase money should be drawn on D., and that he would reimburse to D. one half of what D. should pay thereon. *Held*, that on a count for money paid to the use of the defendant at his request, D. could recover whatever sum was lacking from C. towards such reimbursement, notwithstanding their partnership in the purchase. *Wetherbee* v. *Potter*, 354.

See CONTRACT, 6; EXCEPTIONS, 5; INSOLVENT DEBTOR, 3; MARRIED WOMAN, 1; MONEY HAD AND RECEIVED; PROMISSORY NOTE, 4; TRESPASS; WAIVER, 1.

III. *Answer.*

See APPEAL; WAIVER, 1, 2; WRIT OF ENTRY, 2, 3.

POLICE OFFICER.

See OFFICER, 1, 2.

POOR DEBTOR.

A judgment debtor who has entered into a recognizance, under the Gen. Sts. *c.* 124, § 10, to "appear at the time fixed for his examination and from time to time until the same is concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon," forfeits the recog-

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nizance, if, without leave of the magistrate, he departs after his examination is finished and the magistrate has announced that the oath for the relief of poor debtors is refused him, but while the magistrate is making the certificate of such refusal, required by § 25. *Knight* v. *Sampson*, 36.

See JUDGE.

POST OFFICE.

See PRINCIPAL AND AGENT, 2, 3.

POWER.

See TRUST, 3.

PRACTICE.

See AFFIDAVIT OF MERITS; APPEAL; ARBITRAMENT AND AWARD, 2; ATTORNEY AND COUNSEL; BURDEN OF PROOF; CARRIER, 1; CASE STATED; CORPORATION, 2; COSTS; COURT OF INSOLVENCY; DEPOSITION; DIVORCE, 7; EQUITY, 3–7; EVIDENCE; EXCEPTIONS; HOMESTEAD; HUSBAND AND WIFE, 3; INSOLVENT DEBTOR, 3; INTOXICATING LIQUORS, 1; JUDGE; MARRIED WOMAN, 1; MORTGAGE, 7; PLEADING; POOR DEBTOR; PROMISSORY NOTE, 4, 5; RAILROAD; RECORD; TOWN, 4; TRIAL; TRUSTEE PROCESS, 4, 6; WAIVER; WILL, 3–10; WITNESS; WRIT; WRIT OF ENTRY, 1–3.

PRESCRIPTION.

See TREES, 1; WAY, 1.

PRESUMPTION.

See DEED, 2; INSURANCE, 8; TREES, 1; WAY, 1; WILL, 6.

PRINCIPAL AND AGENT.

1. Evidence that a farm, conveyed by a husband to his wife's brother and by him to her, was occupied by her and her husband, and worked by the latter, who sold produce from it, and let a small tenement belonging to it; together with her testimony that she left the matter of the quarries mostly to her husband; is sufficient to warrant a finding that it was within the scope of his authority as agent for his wife, to dispose of the privilege of quarrying and removing stone from a ledge on the farm. *Merrick* v. *Plumley*, 566.
2. A. sent a promissory note by mail to B. for collection, who forwarded it by mail to C. with a request for C. to collect it, and wrote to A. what he had done, who then wrote to C. that he had received B.'s letter "saying he had forwarded the note to you for collection," and directed C. to "forward" the proceeds when collected. *Held*, that this letter warranted C. in believing that he was authorized to forward the proceeds of the note to A. by mail. *Buell* v. *Chapin*, 594.
3. There is no rule of law that the United States postal service is a less safe or appropriate means for an agent to send money to his principal than a pri-

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vate carrier or banker; but whether it is so in any particular case is a question of fact, depending on the amount to be sent, the proportionate expense of different modes of transmission, the time and distance intervening, the usage in similar cases, and all other circumstances of the transaction. *Ib.*

See CONTRACT, 6, 7, 9; DAMAGES, 3; EXCEPTIONS, 6; FRAUDULENT REPRESENTATIONS, 3; PARTNERSHIP, 1, 3; PATENT; PAYMENT, 1; PLEADING, 1, 2; SALE; SHIPPING, 1, 2; USAGE.

PROBATE.

See ATTORNEY AND COUNSEL; LIMITATIONS, STATUTE OF, 3; WILL, 3–10; WITNESS, 2.

PROCHEIN AMI.

See WRIT OF ENTRY, 1.

PROMISSORY NOTE.

1. In an action on a promissory note to charge as a promisor a party whose indorsement thereof appears below the indorsement of the payee to the plaintiff, parol evidence is admissible to show that the defendant's indorsement was made before the delivery of the note by the maker to the payee for value. *Brown* v. *Butler*, 179.

2. On the trial of an action upon a promissory note there were special findings in favor of the defendant as to the consideration of the note, but the judge directed a general verdict for the plaintiff on grounds to which the defendant alleged exceptions, which were sustained. At the new trial, the plaintiff conceded that those findings negatived the only consideration for the note on which he relied, whereupon the judge ruled that he was estopped from offering evidence of such consideration, and directed a verdict for the defendant. *Held*, that this ruling was erroneous. *Hawkes* v. *Truesdell*, 557.

3. The payees of a promissory note indorsed it to a bank for discount in regular course of business, received and used the proceeds, and, on failure of the maker to pay it at its maturity, arranged with the bank not to call upon them as indorsers, but sue the maker; and as part of such arrangement deposited with the president of the bank individually funds to secure the bank against loss on the note. In the action, they were summoned as trustees of the maker, and defaulted. *Held*, that these facts did not affect the rights of the bank as indorsee. *National Bank of the Republic* v. *Conlan*, 181.

4. In an action by an indorsee against the indorser on a promissory note, evidence of a waiver of demand and notice is sufficient to support an allegation in the declaration of demand and notice. *Harrison* v. *Bailey*, 620.

5. In an action by an indorsee against the indorser on a promissory note, evidence that after the note fell due the defendant promised the plaintiff to pay it is admissible with other evidence as tending to show a waiver of demand and notice. *Ib.*

See MARRIED WOMAN, 3; PAYMENT, 1; TRUSTEE PROCESS, 2, 3; USAGE.

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QUIETING TITLE.

See EQUITY, 1.

RAILER AND BRAWLER.

On the trial of an indictment for being a common railer and brawler, loud and violent language used by the defendant in the heat of sudden altercations may be given in evidence, although used only in his own dwelling-house and addressed only to the persons with whom the altercations occurred; and will sustain the charge, if, with other evidence, it shows that he was accustomed to use immoderate and vituperative language so publicly and frequently as to be a common disturber of the public peace. *Commonwealth* v. *Foley*, 497.

RAILROAD.

An award of commissioners appointed on petition under the St. of 1864, c. 229, § 29, to revise a previous award of commissioners determining the compensation to be paid by one street railway corporation for entering and using the tracks of another, takes effect only when returned to and approved by the court, until which time the former award remains in force. *Metropolitan Railroad Co.* v. *Broadway Railroad Co.* 238.

See CARRIER, 1, 3, 5, 6; DAMAGES, 5; NEGLIGENCE; WAY, 4.

RATIFICATION.

See EVIDENCE, 11.

RECEIVERS.

See CARRIER, 1.

RECOGNIZANCE.

See POOR DEBTOR.

RECORD.

If the record of a court of insolvency shows that a decree was entered in due form for the issue of a certificate of discharge to an insolvent debtor, the judge cannot pass an order annulling such discharge, without notice to the parties interested, if the decree was actually made and truly recorded, or without formal amendment of such record, if it is erroneous. *Marsh* v. *McKenzie*, 64.

See ARBITRAMENT AND AWARD, 2; COURT OF INSOLVENCY; EVIDENCE, 9; INSURANCE, 6.

REMAINDER.

See TRUST, 2, 3; WILL, 1, 2.

REPAIRS.

See EASEMENT, 1, 2; TENANT IN COMMON, 1.

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REPLEVIN.

See MORTGAGE, 9.

RESCISSION.

See CONTRACT, IV.

RESIDENCE.

See DOMICIL.

REVIEW.

See EQUITY, 4, 7; EXCEPTIONS, 7.

RULES OF COURT.

See EQUITY, 6; EXCEPTIONS, 1.

SALE.

A buyer sent an order for goods to the seller in another state who there delivered them to a carrier for transportion to the buyer. *Held*, that the sale was completed in the state where the seller resided, although the terms thereof were originally agreed on by agents of the parties at the residence of the buyer. *Kline* v. *Baker*, 253.

See CONTRACT, 2–9; FRAUDULENT REPRESENTATIONS; HOMESTEAD, 1; INSOLVENT DEBTOR, 2, 3.

SECRETARY OF THE COMMONWEALTH.

See CONSTITUTIONAL LAW.

SEISIN.

See DEED, 2; WRIT OF ENTRY, 4.

SETTLEMENT.

See DOMICIL; INSANITY.

SEWER.

1. A sewer built between Garden Brook and the Connecticut River in Springfield, under the authority of the St. of 1863, *c.* 107, § 1, "for the purpose of protecting private property and the streets of the city from damage by water during seasons of freshet," and under § 6 "to be used, controlled, maintained and repaired in the same manner as drains constructed wholly at the expense of the city," is not necessarily restricted from uses for which the city may receive pay from persons entering it with their private drains. *Patton* v. *Springfield*, 627.
2. A jury impanelled under the St. of 1863, *c.* 107, § 3, to revise a determination of the city council of Springfield, under § 2, of the division, between the city and the owners of benefited land, of the cost of building a sewer between Garden Brook and the Connecticut River under that statute, may

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in such revision take into consideration whether the city derives or has means to derive any revenue from the use of the sewer by persons who may pay for draining directly into it from land through which it passes, but which is not included in the district for the benefit of which it is built and on which its cost is in part assessed; and, if it is so located and built as to take and carry off sewage brought to it by other sewers or drains already built or likely to be required to drain lands situated beyond or higher upon Garden Brook, they may also take into consideration the interest of the city in such other sewers and drains. *Ib.*

3. On the revision, by a jury impanelled on the petition of persons who alleged that their land was not benefited, of a determination of the city council of Springfield under the St. of 1863, *c.* 107, § 2, of the extent of land benefited by the building of a sewer under that statute, and of the division of the cost of the sewer between the city and the landowners, the presiding officer refused the request of the city to instruct the jury that they "were not to determine whether or not the amount of benefit was equal to the probable cost to the petitioners, but only whether or not the premises included were benefited." *Held*, that this refusal was erroneous, although he did instruct them that the objection that the land of the petitioners was not benefited should be sustained unless they should find that it might receive some appreciable or substantial benefit from the sewer. *Ib.*
4. After the acceptance by the superior court of the verdict of a jury impanelled under the St. of 1863, *c.* 107, to revise a determination of the city council of Springfield of the extent of land benefited by the building of a sewer under that statute, and of the division of the cost of the sewer between the city and the landowners, an appeal lies to this court on questions of law appearing from the record of their proceedings; and if, on such an appeal, it appears that the findings of the jury were upon distinct and separate issues, in reference to part of which errors of law are manifest, a new trial should be ordered on such part only, and the acceptance of the verdict affirmed as to the residue. *Ib.*

SHIPPING.

1. A written contract for supplies for a vessel for which the master has authority to bind the owners is binding on them if such appears to be the intention as gathered from the whole instrument, although signed by him in his own name only. *Negus* v. *Simpson*, 388.
2. The authority of the master of a vessel to bind the owners by a contract in a foreign port for the necessary supply of a chronometer for her includes authority to obtain a chronometer by hiring with an option of purchase. *Ib.*
3. The ports of the several states of the United States are to each other foreign ports, as regards the authority of masters of vessels lying therein to pledge the credit of the owners for supplies necessary for their vessels. *Ib.*

See ACTION, 4.

SOLDIER.

See TOWN, 3.

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SPIRITUOUS AND INTOXICATING LIQUORS.

See INTOXICATING LIQUORS.

SPRINGFIELD, CITY OF.

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STOCK DIVIDEND.

See TRUST, 1.

TAX.

1. The tax of a certain percentage of the par of its capital stock, imposed by the St. of 1865, *c.* 283, § 8, on every company or association "having an office or place of business within this Commonwealth for the direction of its affairs or transfer of shares," and "incorporated elsewhere" "for the purpose of engaging without the limits of the Commonwealth in the business of coal mining or other mining, quarrying, or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling or holding mines or lands without the Commonwealth," is warranted by the Constitution of the Commonwealth, and is not in conflict with the Constitution of the United States; nor was said § 8 in any respect repealed or annulled by the St. of 1866, *c.* 291. *Attorney General* v. *Bay State Mining Co.* 148.
2. The tax imposed by the St. of 1865, *c.* 283, on corporations chartered by the Commonwealth or organized under the general laws for purposes of business or profit, having a capital stock divided into shares, is a tax on their franchises, and not on their property; and it is no reason for abatement of any portion of such a tax, that, in computing the market value of the capital stock of the corporation as the true value of its corporate franchise, the tax commissioner omits to make any deduction for a portion of its property invested in bonds of the United States which are exempt from taxation by any state. *Manufacturers' Insurance Co.* v. *Loud*, 146.

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3. A farm, and the farming stock, owned by an institution incorporated with this Commonwealth for the education of youth, and by it worked solely raise produce and do team work for a boarding-house kept by the institutic to supply board to the students at its actual cost, is exempted from taxatic by the Gen. Sts. *c.* 11, § 5, *cl.* 3; and it is immaterial that one eighth pa of the farm, which consists of waste and swampy land and connects othe parts which are cultivated and with which it was bought, is suffered to li unused. *Wesleyan Academy* v. *Wilbraham*, 599.

4. The assessment of a joint tax on two parcels of land of different owners based on a joint valuation thereof, creates no lien for the whole or any part of such tax; and no apportionment of such a tax will create a lien, unless made as a formal reassessment of the separate parcel, and based on a separate valuation thereof, with a corresponding change in the assessors' lists. *Jennings* v. *Collins*, 29.

See BANK, 1, 2; EQUITY, 2; OFFICER, 3; TOWN, 2–4.

TENANT AT SUFFERANCE.

See LANDLORD AND TENANT, 3–5; MARRIED WOMAN, 6.

TENANT AT WILL.

See LANDLORD AND TENANT, 1–4.

TENANT FOR LIFE.

See TRUST, 1–3; WILL, 2.

TENANT IN COMMON.

1. In this Commonwealth, a tenant in common who makes necessary repairs upon the common property without the consent of his cotenant cannot maintain an action at law against him to recover contribution for the cost thereof. *Calvert* v. *Aldrich*, 74.

2. By an oral contract between A. and B. for the cultivation of B.'s land, each was to furnish one half of the seed and manure, B. to do the team work, and A. the hand work and harvesting of the crop, which they were to divide equally. Each furnished his share of material, and did his share of the work, until after the crop began to grow, when B. refused to do more work, and forbade A. to go again upon the land. A. nevertheless entered the land again at harvest time, and cut the crop, when B. seized and consumed the whole of it against A.'s will, no division of it having been made, nor any demanded by either of them. *Held*, that they were tenants in common of the crop, and B. was liable in tort for his conversion of A.'s share of it. *Delaney* v. *Root*, 546.

See EASEMENT, 4.

TIME.

See INSURANCE, 9; LANDLORD AND TENANT, 3; RAILROAD; WAY, 3; WILL, 4, 8, 9.

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TOWN.

1. The power to invest town officers lawfully chosen at a town meeting with any special authority which the town may lawfully confer upon them in the exercise of their official duties is incident to the power to choose them. *Sherman* v. *Torrey*, 472.
2. A specification in the warrant for an annual town meeting that it is called "to elect all necessary town officers for the ensuing year," and "to raise and appropriate such sums of money as may be necessary to defray town charges for the coming year and pay any indebtedness of the town," is sufficient, under the Gen. Sts. *c.* 18, § 22, to authorize the town to vote at the meeting, in conformity with the Gen. Sts. *c.* 18, § 73, to invest the collector of taxes then duly chosen with all the powers which a town treasurer has when appointed collector of taxes. *Ib.*
3. To bring proceedings of a city or town within the clause of the St. of 1866, *c.* 70, excepting from the operation of the repeal of the St. of 1865, *c.* 152, "proceedings already begun in any city or town for reimbursement, under said act," to individuals of money contributed by them to fill its quota of troops, there must have been, before the time when the repealing statute took effect, either the borrowing of money, or the creating of a legal debt against the city or town, or a vote sufficient to warrant the assessors in proceeding to lay a tax to raise money, for the purpose of reimbursement. *Copeland* v. *Huntington*, 525.
4. No previous delay of the taxable inhabitants of a town to complain, on the Gen. Sts. *c.* 18, § 79, against the payment from its treasury of money for a purpose other than those for which it has the legal right and power, will bar the right of the complainants to a remedy on the statute, if their petition is filed or their suit commenced before the money is actually paid. *Ib.*

See OFFICER, 1; SEWER; TREES, 2; WAY.

TREES.

1. Evidence that shade trees have been suffered to stand more than twenty years where they were planted in a public way raises a presumption that they were planted under lawful authority. *Bliss* v. *Ball*, 597.
2. Only the mayor and aldermen or selectmen have authority to cause shade trees lawfully standing in a public way to be removed against the will of the person whose private property they are to be taken to be, under the Gen. Sts. *c.* 46, § 6: and one who assumes, without such authority, to remove or destroy such trees, on the ground that they are a public nuisance, is liable in damages to such person. *Ib.*
3. In an action for destroying the plaintiff's shade trees, it is no ground of defence or mitigation of damages that they rendered the defendant's house damp and unhealthy. *Ib.*

TRESPASS.

A grantee who has buried the remains of his child in a lot in a cemetery, of which he holds possession under a deed from the proprietor which sets forth

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that such grantee is entitled to the lot, *habendum* to him and his heirs and assigns, to his and their use as a place of burial for the dead, may maintain an action of tort in the nature of trespass *quare clausum fregit* against the superintendent of the cemetery for disinterring and removing the remains therefrom, although the cemetery has never been licensed under the Gen. Sts. *c.* 28, § 5, for purposes of burial, and although the plaintiff's deed is on condition that the lot shall not be transferred without consent of the proprietor, and shall be subject to his regulations in the care and management of the cemetery; and in measuring damages the jury may take into consideration the injury of the plaintiff's feelings, if it appears that the defendant acted in wilful disregard or careless ignorance of the plaintiff's rights. *Meagher* v. *Driscoll*, 281.

See LANDLORD AND TENANT, 2.

TRIAL.

Where two persons were indicted jointly for murder, and there was evidence tending to show that one of them had made a confession which implicated both, it was *held* that separate trials ought to be granted, if such evidence was to be offered. *Commonwealth* v. *James*, 438.

See WILL, 10.

TRUST.

1. If a fund held in trust to pay the income to one until his death, and then convey the capital to another, includes shares in the stock of a corporation, shares of additional stock distributed to the trustee as a lawful dividend thereon accrue as capital, although they represent net earnings of the corporation. *Minot* v. *Paine*, 101.
2. A testatrix in her will gave "the improvement of my property in trust to" a trustee named, "the income to be paid equally to my brother and my sister during their natural lives, and at their death the principal I give to my nephews and nieces then surviving." The brother died after the death of the testatrix, and left the sister surviving. *Held*, that the whole income of the property was payable thereafter to the sister until her death, until which time the gift over in remainder to the nephews and nieces was not to take effect. *Loring* v. *Coolidge*, 191.
3. T. conveyed land to C., wife of W., "for and during her natural life, and from and after her decease to the persons who would then be the heirs at law of W. if he had then died intestate;" but "upon the trusts and with the powers following:" that C., at any time during the life of W., might, with his consent in writing and under seal, "sell and convey the granted premises, or any part or parts thereof, in fee simple or for any less estate," "the net proceeds of all such sales to be reinvested and held on the same trusts and way as the property so sold," and her deed, with the consent of W., should "cut off the rights of said remaindermen in the granted premises as fully and effectually as if such remainder had not been hereby created and the abso-

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lute estate in fee simple had been hereby granted to said C." *Held*, that C. took the fee of the land, in trust; that her own deed, with the concurrence of her husband in the manner provided, would be sufficient to convey the whole title; that no title remained in T.; that the beneficial interest of C. was the use during her life; that, in event of a sale by her, if the reinvestment should be made in real estate, the trust should be fully declared; and that the trust applied to the whole estate conveyed by T., and did not authorize the sale of the interest in remainder and reinvestment of the proceeds thereof separately from the estate in possession. *Stockbridge* v. *Stockbridge*, 244.

4. A testator gave to trustees property variously invested, "to be disposed of for the benefit of the poor in the manner hereinafter provided;" and directed the trustees and their successors to appoint a committee of three or more gentlemen who should "determine how, by the payments to permanently established and incorporated institutions, my wish to benefit the poor will be best carried into effect," and to dispose of and pay over the trust fund "in accordance with the determination of the said gentlemen certified by them to the trustees." The trustees selected the committee, who determined that certain sums expressed in money should be paid to various corporations of the kind described, and that, if the trust fund should exceed the aggregate of these sums, "the residue is to be subject of future disposal by us." Some years afterwards elapsed before the trustees became able to reduce the fund to money and pay it over; the residue of the fund at the time of the determination of the committee was more than the aggregate sum which they apportioned; and during the interval the income of the fund accumulated at a rate greater than the legal rate of interest, and one of the committee died; *Held*, that the corporations designated were not entitled to take the income of any specific part of the fund, nor shares of the whole income proportioned to the sums designated to be paid to them: but to receive the amount of legal interest on such sums from the time of the report of the committee; and that any surplus of the income, after payment of such interest, should be added to the fund for further distribution. *Held*, *also*, that the vacancy on the committee could be filled by appointment by the trustees; and that no further distribution of the fund could be made until after the filling of such vacancy. *Held*, *further*, that in such further distribution the committee might designate payments to institutions of the kind described in the will incorporated since the creation of the trust. *Marsh* v. *Renton*, 132.

5. A will proved in Massachusetts, where the testator had his domicil, directed trustees of his estate "to raise the sum of one hundred and fifty thousand francs, money of France, and to apply the same to the fulfillment of a certain marriage contract," made at Geneva in Switzerland, in which the testator, the father of the future wife, agreed to pay to her an annuity of six thousand francs, money of France, to cease at his death and "be then converted into a capital of one hundred and fifty thousand francs," which should "only be handed over to the future wife or to her children against a sufficient mort-

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gage, or any other equivalent guaranty, to be given by the future husband." After the death of the testator, the husband executed an instrument at Vienna in Austria, renouncing all right in this fund, and declaring it unnecessary for him to give security for a sum which he never received. Subsequently, at Cracow in Austria, where the husband and wife had their domicil at the time, an ecclesiastical court granted to her a decree of divorce from bed and board for life, for his criminal conduct, reserving to her and to their son "all the rights of property which according to the law of the land belong to an innocent wife and the children," and declaring that, "notwithstanding the decree of divorce for life, she remains at liberty to consent to live together with her husband in case he should bring sincere proofs" of reformation. By the law of Geneva and of Austria, a payment of the fund to her, without due security for its proper investment according to the marriage contract, would not discharge the trustees from responsibility, notwithstanding the release of the husband and the divorce. *Held*, that the amount to be raised from the estate for the fund was such a sum, computed in treasury notes of the United States, as would purchase a hundred and fifty thousand francs deliverable here; and that the trustees should continue to hold the fund in trust for the benefit of the wife, until the further order of the court, with liberty to apply for further instructions in event of the death of her, or of her husband, or other change of circumstances. *Bowditch* v. *Soltyk*, 136.

See COSTS, 2; ESTATE TAIL; INSURANCE, 4; MONEY HAD AND RECEIVED, 2.

TRUSTEE PROCESS.

1. A party summoned as trustee in a process of foreign attachment in this Commonwealth is not chargeable on account of his possession, at the time he receives service of the writ, of funds for which an action by the principal defendant is then pending against him in another state, in which he has entered his appearance. *American Bank* v. *Rollins*, 313.

2. A party summoned as trustee in a process of foreign attachment filed an answer generally denying liability as such, and to interrogatories of the plaintiff replied that at the time of receiving service of the writ he did have in his possession a promissory note due that day and payable to the defendant's order, which he received from a correspondent with directions to collect and pass the proceeds to such correspondent's credit; with which directions he complied; that he never had any communication with the defendant, nor was ever informed by any one in his behalf that such proceeds belonged to him: and that he had advised his correspondent of the service of the writ, who replied that he would take care of it and asked him to hand the summons to an attorney-at-law. *Held*, that he was not chargeable as trustee, although it did not appear that the note was ever indorsed by the defendant. *Richards* v. *Stephenson*, 311.

3. The maker of a promissory note payable on demand, and due and unpaid at

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the time of the service of the writ on him, is chargeable in foreign attachment as trustee of the payee, in the absence of proof of the transfer or indorsement of the note. *Scott* v. *Hawkins*, 550.

4. A person cannot be admitted for the first time, in this court, as claimant of funds in the hands of the trustee in an action of foreign attachment in the superior court, in which the question of charging the trustee on his answer is pending in this court on appeal. *Ib.*

5. An insurance company summoned as trustees in foreign attachment answered generally, denying possession of goods, effects or credits of the defendant; and to interrogatories of the plaintiff replied that they issued a policy against loss by fire on the defendant's goods in a building, and had received notice of the destruction of the goods by fire, but were informed and verily believed that the policy was avoided by a misrepresentation of the defendant, in obtaining the insurance, that the building was detached, when in fact there was a building adjoining which materially affected the risk. The plaintiff then alleged and offered to prove, under the Gen. Sts. *c.* 142, § 11, that the insurance was not effected upon a detached building, and that there was no adjoining building which materially affected the risk; but the judge excluded the evidence as immaterial, and ordered the trustees to be discharged. *Held*, that the plaintiff had no ground for exceptions. *Bostwick* v. *Bass*, 469.

6. A plaintiff in a trustee process, in whose favor final judgment is rendered against the principal defendant, but the trustee discharged, in the superior court, and who, after appealing from the discharge of the trustee, takes out execution in that court against the principal defendant, thereby waives his appeal. *Jarvis* v. *Mitchell*, 530.

See Case Stated; Check; Costs, 3, 4; Married Woman, 3; Promissory Note, 3.

UNDUE INFLUENCE.

See Burden of Proof, 1, 2; Deed, 5; Evidence, 10–12; Will, 5–10.

USAGE.

A usage of agents, in collecting drafts for absent parties, to surrender them to the drawees at maturity, and, upon mere confidence in the good credit of the drawees, to take in exchange their checks upon banks, is not a reasonable usage. *Whitney* v. *Esson*, 308.

See Carrier, 2; Evidence, 18.

USURY.

See Equity, 6; Insolvent Debtor, 1.

VERDICT.

A verdict for a party bound by the nature of his action to maintain one proposition against another is necessarily wrong, if all the evidence on which it is

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rendered tends equally to support either proposition. *Smith* v. *First National Bank*, 605.

See ESTOPPEL; SEWER, 4.

WAIVER.

1. An objection that an answer admits the allegations of the declaration must be deemed to have been waived, if it is first taken at the argument of exceptions to a ruling that the plaintiff could not maintain the action on the evidence offered at the trial without amending the declaration. *Drury* v. *Newman*, 256.
2. The objection that a defence is not open to a defendant under his answer must be deemed to have been waived, if first made at the hearing of exceptions to a ruling on evidence introduced in support of such defence without objection at the trial on a review of a cause in which the original judgment was entered on default. *Stowe* v. *Bowen*, 194.

See EQUITY, 7; EVIDENCE, 5; EXCEPTIONS, 8; INSOLVENT DEBTOR, 3; PROMISSORY NOTE, 4, 5; TRUSTEE PROCESS, 6.

WAREHOUSEMAN.

See BURDEN OF PROOF, 3.

WARRANT.

See OFFICER, 3; TOWN, 2.

WATER AND WATERCOURSE.

See ACTION, 4, 5; EASEMENT, 4; MILL AND MILL PRIVILEGE.

WAY.

1. Possession and occupation for more than twenty years of land bounding on a public way is presumptive evidence of title to the middle of the way, subject to the public easement. *Bliss* v. *Ball*, 597.
2. In that clause of the Gen. Sts. *c.* 43, § 79, which gives to any person aggrieved by doings of the board of aldermen of the city of Boston in relation to laying out a way the right, if his application is merely for assessment of damages, to apply for a jury within one year after the final determination of any suit wherein the legal effect of their doings is drawn in question, the words "any suit" embrace only suits to which the applicant is a party and so bound by the judgment, or the judgment in which is binding on all persons, like a judgment *in rem*. *Shute* v. *Boston*, 236.
3. A marketman who had a lawful right to occupy with his wagon a stand in a street in a city from and after a certain hour, drove his wagon into the street twenty-three minutes before the hour, and was so delayed there in his progress towards his stand, being stopped in one place five or six minutes by the crowding of other vehicles, that it was fifteen minutes before the hour when he reached the stand, where he stopped with his wagon until after the hour.

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Held, that he did not violate an ordinance of the city, which provided that no owner or driver of a wagon should suffer it to stop in any street more than twenty minutes in any case. *Commonwealth* v. *Brooks*, 434.

4. One who in travelling on a public way carelessly injures a laborer engaged with due care in clearing from ice the track of a street railroad lawfully located therein is liable in damages for the injury. *Quirk* v. *Holt*, 164.

See ACTION, 3; EASEMENT, 1–3; NEGLIGENCE.

WHARF.

See ACTION, 4.

WILL.

1. A devise recited that the testator gave to his daughter, (who, with her children, survived him,) land for her life, "and, in the event of her decease, I do then give the same in equal shares to her children and their heirs and assigns." *Held*, that the devise over gave to her children vested remainders in fee simple. *Pike* v. *Stephenson*, 188.

2. A testator devised "to my daughters P. and G., for the term of their natural lives, all my real estate, to be held by them to their own use and behoof during life, as tenants in common, and at their death to their heirs and assigns." *Held*, that G. took, by the Gen. Sts. *c.* 89, § 12, a life estate in an undivided half of the real estate, the remainder in which half was contingent until her death, when it vested in those who were then her heirs at law; and that no proceedings in a suit for partition between the tenants for life could affect the question in whom such remainder should vest. *Putnam* v. *Gleason*, 454.

3. On the issue whether an instrument offered for probate as a will was executed when the testator was of sound and disposing mind, the opinions of physicians who attended him professionally during a sickness in which he executed it are admissible in evidence, as to his mental capacity to make a will immediately before and after its actual execution, accompanied by statements of the symptoms and appearances on which such opinions were based; although they were not family physicians of the testator, nor had made special study of mental disease. *Hastings* v. *Rider*, 622.

4. On the issue whether a testator was of sound and disposing mind at the time of executing a will between seven and eight o'clock on the morning of the day of his death from cholera, with which he had been sick for three days, *Held*, that the opinion of a physician who was called to attend him professionally at three o'clock on the previous afternoon, remained with him till four o'clock in the morning, and returned to him at eight o'clock, as to his mental capacity to make a will at the two hours last named; and also the opinion of another physician who was called to attend him professionally at eleven o'clock on that morning, as to his mental capacity to make a will at that hour; were admissible in evidence, accompanied by their statements of the symptoms and appearances upon which such opinions were founded; although neither witness was the family physician of the testator or had made special study of mental disease. *Ib.*

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5. On the trial of issues whether the execution of a will was procured by fraud or undue influence, and whether the will was executed by the testatrix in ignorance of its contents, after the introduction of evidence of a previous condition of her mind having relation to the disposal of her property, evidence of her subsequent acts or declarations is admissible to prove the subsequent existence of that condition, if such acts or declarations are significant of a condition sufficiently permanent in its nature, and occurred so soon after the execution of the will as to afford a reasonable inference that such was then also the condition of her mind; but such evidence is inadmissible to prove the actual fact of fraud or undue influence in another. *Shailer* v. *Bumstead*, 112.

6. On the trial of issues whether the execution of a will was procured by fraud or undue influence, and whether the will was executed by the testatrix in ignorance of its contents, evidence of her subsequent acts or declarations indicating dissatisfaction with or ignorance of its contents is admissible to rebut any presumption of the free execution of the will which may arise from the fact that it remained unrevoked for any considerable time. *Ib.*

7. On the offer of a will for probate, evidence of declarations or acts of parties to the record, subsequent to the execution of the will, whether before or after the death of the testatrix, is inadmissible to prove that the will "was contrary to her intentions, or that she was ignorant of its contents, and that it was procured by fraud and undue influence of" such parties, if there are other parties to be affected thereby who are not jointly interested nor in privity with them. *Ib.*

8. On the trial of the validity of a will executed when the testatrix was seventy-eight years old, there is no ground of exception to the exclusion of evidence of her mental and moral condition fifteen months afterwards, when she was affected with paralysis; and also of evidence of her bodily and mental condition at subsequent periods until her death at the age of ninety-one; which is offered to prove that she was weak in body and mind when she executed the will. *Ib.*

9. On the trial of the validity of a will executed when the testatrix was seventy-eight years old, there is no ground of exception to the exclusion of evidence "that several of her family had been in advanced age affected with paralysis accompanied by an enfeebling of the mental and moral powers, and that it was a family tendency," which is offered "as bearing on the question of the condition of her mental and bodily powers" at the time when she executed the will, and for the introduction of which the only foundation laid is, evidence that two years before that time she complained of feeling numb, and at that time and afterwards was physically weak and somnolent and mentally inactive, and an offer of evidence that fifteen months after executing the will she was affected with paralysis. *Ib.*

10. On an appeal from the allowance, as the last will of a person deceased, of a will, and of a codicil thereto executed several years afterwards, like issues for a jury, including the issue whether the execution of the instrument was

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procured by fraud or undue influence, having been framed, as to a will executed several years previously; as to the will allowed; and as to the codicil thereto; it was alleged that, during the interval between the execution of the will allowed and the execution of the codicil, the physical and mental powers of the testatrix were seriously affected by sickness; whereupon the judge denied a request of the appellants for a trial of the issues as to all the instruments together, and directed a separate trial thereof as to each instrument, commencing with the will allowed. *Held*, that there was no ground of exception to this denial and direction. *Ib.*

See BURDEN OF PROOF, 1; COSTS, 2; INSURANCE, 1; TRUST, 2, 4, 5; WITNESS, 2.

WITNESS.

1. A witness in a civil case is not bound to attend court after the time for which his fees have been paid or tendered to him. *Atwood* v. *Scott*, 177.

2. On the offer of a will for probate, the testator is not such "an original party to the contract or cause of action" as to render any party to the record incompetent as a witness, under the Gen. Sts. *c.* 131, § 14. *Shailer* v. *Bumstead*, 112.

3. Under the Gen. Sts. *c.* 131, § 14, on a trial of the validity of a deed to a married woman her husband is a competent witness in her behalf notwithstanding the death of the grantor. *Howe* v. *Howe*, 88.

4. The word "conviction," as used in the provision of the Gen. Sts. *c.* 131, § 13, that the conviction of any crime may be shown to affect the credibility of a witness in any proceeding, civil and criminal, in court or before a person having authority to receive evidence, implies a judgment of court. *Commonwealth* v. *Gorham*, 420.

See ACCOMPLICE, 1, 2; EVIDENCE, 3, 13, 19; EXCEPTIONS, 2; WILL, 3, 4.

WORDS.

"Conviction." See WITNESS, 4.

"More or less." See CONTRACT, 4, 5.

WRIT.

In an action pending in the superior court, in which the plaintiff of record disclaims the use of his name, and which is continued in court only on the assumption that another person is entitled to sue in such plaintiff's name to enforce a claim belonging equitably to himself, an order for an indorser may properly be directed to such other person. *Petitcler* v. *Willis*, 460.

See EXCEPTIONS, 13.

WRIT OF ENTRY.

1. A writ of entry in behalf of minor heirs cannot be maintained in the name of their guardian, but should be brought in their name by their next friend. *Jennings* v. *Collins*, 29.

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2. Under plea of *nul disseisin* to a writ of entry, the tenant is estopped from denying that he holds the freehold against the demandant. *Swan* v. *Stephens*, 7.

3. Under plea of *nul disseisin*, without further specification, the tenant may set up a right of homestead in defence against a writ of entry. *Ib.*

4. A judgment creditor, after receiving from the officer seisin and possession of land of the debtor upon which the execution was levied, conveyed it by deed of quitclaim without any covenants, and afterwards brought in his own name, and prosecuted for the benefit of his grantee, a writ of entry against one in whom was vested the title of a person to whom such debtor had conveyed the premises after the debt accrued but before the levy of the execution. On this writ of entry he obtained judgment, but never took out a writ of possession. His grantee afterwards conveyed the premises to F. by deed delivered on the land; the tenant in the writ of entry having previously made a deed thereof to the original debtor, expressed to be subject to the rights of the creditor, and such debtor having given a bond for a deed of them to R. *Held*, that F. might maintain a writ of entry for the premises, against R., who had acquired no title thereto by prescription. *Farwell* v. *Rogers*, 33.

See EXECUTION.

ERRORS NOTED IN PREVIOUS VOLUMES OF THIS SERIES.

VOL. XCVII.

Page 229. 15th line from bottom. Substitute "thus" for "they."
" 294. 10th line from top. Transpose "*G. F. Hoar*" and "*F. P. Goulding.*"
" 356. 2d line of opinion. Transpose "plaintiff" and "defendant."
" 429. 3d line from bottom. Substitute "*G. Marston*" for "*H. A. Scudder.*"
" 502. 12th line from bottom. Substitute "accord" for "award."
" 529. 14th line from bottom. Substitute "*Pearce*" for "*Pierce.*"
" 544. 6th line from bottom. Substitute "*Regina*" for "*Rex.*"
" 614. In cross-references under title "Damages." Insert "Liquidated Damages."
" 628. 2d line from bottom. Insert "2" at beginning of line.
" 629. 2d line from top. Substitute "*Chandler* v. *Simmons*, 508" for "*Ib.*"
" 635. 17th line from bottom. Add "s" at end of line.
" 654. Refer in proper tabular position under title "Statutes Cited, &c." to "Gen. Sts. c. 124, § 5. Arrest. p. 524."

VOL. XCVIII.

Page 64. 15th line from bottom. Substitute "*Emerson*" for "*Emmons.*"
" 504. 9th line from bottom. Substitute "8 Cush. 124" for "10 Cush. 174."
" 521. 5th line of head-note. Substitute "defendant" for "plaintiff."
" 563. 9th line from bottom. Substitute "judge ruled" for "jury were instructed."
" 648. 21st line from bottom. Substitute "defendant" for "plaintiff."
" 652. In cross-references under title "Specific Performance." Substitute "Contract, 12" for "Presumption, 1."

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